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SOME REASONS WHY THE OPINIONS OF THE JUDGES IN SOME STATES ARE NOT MORE CAREFULLY CONSIDERED BY THE WHOLE COURT.

We have had occasion before to speak of the great amount of complaint indulged in among the members of the bar of several states because, more than ever before, the higher courts are getting to be, what is termed, "one man courts." What is meant is, that the cases are divided between the judges and very little consideration is given by the other members of the court to those cases assigned to each particular judge, and that the tendency has grown of late, to allow opinions to stand which some of the judges, probably, never have seen, and yet they are presumed to be the opinions of the court. It is also stated that the opinions of the early judges are far better considered than those which have issued from those courts of late years. There are good reasons why such a state of facts exists. In the first place the business of the court has greatly increased of late years, without a corresponding increase in the judicial force, and in order to get through with the work the judges have gradually grown to accept the opinion as written by the judge to whom the case is assigned, in order to keep up with the work. Some of the judges sometimes conceive the idea that in order to demonstrate their judicial greatness, it is necessary to depart from the rules as laid down in previous opinions, with the real result of an actual departure from true lines and a conflict of opinion in the reports. Such cases as these are not given the careful consideration by the whole court which they demand.

It is certainly commendable in a judge who really shows that some opinions are not based on correct principles and pointing them out demonstrates that justice will be better conserved by adopting correct principles. The departures from the true lines are usually in the opinions of the "New to the Bench" judges. To write satisfactory opinions means, in a great many cases, several days' work, and in a few cases even weeks, of careful thought and work, so that now, with the greatly increased amount of work, if the opinions of some of our judges are not as thoughtfully considered as those of their predecessors, it is because the judges of to-day have a far greater number of cases to consider. We have noticed some severe restrictions relative to the Supreme Court of the United States, in one of the law journals, in regard to dissenting opinions in many cases. While it would be a fine thing to have good, unanimous opinions by that august body, yet we believe that the office of the dissenting opinion of frequent great importance. We have the assurance in them that every question brought before the Supreme Court of the United States has been considered thoughtfully by every judge on the bench. The law should keep step with the progress of the age, though "science moves but slowly, creeping on from point to point," yet, in all truth it moves lagging in the rear of the requirements of the time too often, a dissenting opinion frequently means that sooner or later it will be the opinion of the court.

We always rejoice to see opinions, which, though the right of a matter is seemingly tangled in the meshes of judicial opinion, are nicely worked out by the common sense use of principles which are made to command what is right. The case of Judd v. Walker, recently decided in the St. Louis Court of Appeals, not yet reported, is a case in point. The opinion is an able one by Mr. Justice Nortoni. We have made that case the leading case in this issue of the Journal. A judge is not half fitted for his work till he has learned that legal principles are intended to bear such a relationship to each other that they may be woven into a garb of justice in which to clothe the very right of a matter. And how frequent the cases are which seem to have been decided as though the very opposite were true. In this day of so much case law our judges are not thinking much about the logical relationship of legal principles. It is much easier to determine the matter from a case on "all fours." So we say if we have not enough judges to give the proper consideration to the cases brought before them, increase the number. It is a sad day for the state when the attorneys begin to lose confidence in the work of the higher courts.

NOTES OF IMPORTANT DECISIONS.

ACTIONS—ALTHOUGH THE ACTS OF TWO PARTIES CONTRIBUTED TO AN INJURY, THE ACTS BEING INDEPENDENT OF EACH OTHER, CANNOT BE JOINED.—The case of Mason v. Geo H. Copeland & Co., 61 Atl. Rep. 650, decided by the Supreme Court of Rhode Island, presents an interesting question of practice. Aside from the statutory question, which the case involves, the question whether two persons acting independently of each other contributing to an injury, may be held jointly in an action for damages for an accident. The court said:

"The plaintiff brought action for negligence against a copartnership and a corporation, and charges in the first count of his declaration that the copartners, proprietors of a livery stable, let out to the plaintiff, for the use of his wife, horses and a carriage, in charge of their servant, a driver, and that he so negligently drove and managed the horses that they became frightened and unmanageable and ran away, upsetting the carriage, and injuring the wife of the plaintiff, to his damage. The second count charges the copartners with negligence in letting the horses, which they knew, or ought to have known, were dangerous, easily frightened, and likely to become unmanageable. The third count is against the firm and the Rhode Island Company, a corporation, jointly, for the negligence of the driver in managing the horses and the negligence of the motorman of the corporation in bringing a car under his control to a sudden stop, just behind the carriage in which the plaintiff's wife was seated, by applying the brakes in such a manner as to cause a terryfying noise or shriek; so that by reason of the simultaneous and concurrent negligence of the driver and motorman the horses became frightened, ran away, and overturned the carriage, injuring the plaintiff's wife, etc. The fourth count alleges a further joint negligence on the part of the firm and corporation by combining together negligence of the copartnership in furnishing the unsafe horses, as set out in the second count, and negligence of the motorman of the corporation in running its car violently against the rear of the carriage, thus causing injury to the plaintiff's wife. The fifth count is against the Rhode Island Company alone, for its negligence set out in the third count, and the sixth count is against the same corporation for the negligence alleged in the fourth count. To this declaration the defendant corporation, the Rhode Island Company, has pleaded the general issue, and the other defendants, Albert H. Olney and Ellen Holden, have demurred to the same upon the grounds that the plaintiff therein has joined counts against them with counts against the Rhode Island Company; and for further grounds of demurrer to the foregoing third and fourth counts they say: 'First. That the said defendants Olney and Holden are improperly joined with the said Rhode Island Company. Second. That the act complained of is not a joint tort as between the defendants Olney and Holden and the defendant the Rhode Island Company. Third. That there was no community of wrongdoing as between the said defendants Olney and Holden and the said defendant the Rhode Island Company.'

The following questions of law are raised by the demurrer: First. Whether, under Gen. Laws, 1896, ch. 233, § 20, the plaintiff in a case like this can join in one declaration several counts against two or more defendants with each other, and with joint counts against both. Second. Whether, in such circumstances as those alleged in the third and fourth counts of this declaration, joint counts against two defendants acting independently of each other are proper.

These questions must be answered in the negative. As fully explained in Phenix Iron Foundry v. Lockwood, 21 R. I. 556, 45 Atl. Rep. 546, the statute does not authorize the joinder of distinct causes of action against separate defendants. The plaintiff is mistaken in saying that in the case at bar there is only one cause of action, one injury, and one damage, and that the only question is which of two parties, if either, is responsible. The duty which the defendant firm owed to the plaintiff is essentially different from that imposed upon the street railway corporation, and the tort of the former, which is alleged to consist in letting horses known to be intractable or in charge of an incompetent driver, is not the same tort as that charged upon the latter, which consisted in negligently stopping an electric car to the injury of a person not a passenger thereon, although the two torts may have culminated in one injury. There is no question properly raised in this declaration as to which party is responsible. If the declaration is true, both parties are responsible in separate actions. The case does not present the concurrence of intention in the commission of a tort, which is necessary to make a joint tort. The mere unintentional concurrence of the acts of two distinct parties resulting in damage to the plaintiff does not give him an action against the parties jointly, but a separate action against each of them. Bennett v. Fifield, 13 R. I. 139, 43 Am. Rep. 17. As stated in Cole v. Lippitt, 22 R. I. 31, 46 Atl. Rep. 43: 'A joint liability is not made out by patching together individual liabilities which may arise from different relations to the same transaction.' While it is true that many of the cases cited by the plaintiff from courts of different jurisdictions measurably sustain his contention, in this state the stricter rule has been adopted; and we see no good reason in this case for departing from it. For these reasons the demurrer must be sustained."

WILLS — CONSTRUCTION OF TERM DYING WITHOUT ISSUE LIVING AT TIME OF DEATH.—In the case of Beckley v. Riegert, Supreme Court

of Pennsylvania, 61 Atl. Rep. 641, the court said:

"The question to be determined is whether the plaintiff took an estate tail, converted to a fee simple by virtue of the act of April 27, 1855 (P. L. 368), or a life estate only, under the following provision of his father's will: 'I give and devise unto my son Adam my messuage, tenement or tract of land—during the natural life of my son Adam. If my son Adam shall die without lawful issue, then the above devised messuage or tract of land shall fall back to my two sons, Franklin and George, but if my son Adam having lawful issue at the time of his death, then I give and devise the above messuage or tract of land to him and his heirs forever.' In terms the testator gave a life estate to his son Adam, with remainder to Adam's issue, if he had issue at the time of his death, and in default thereof to the testator's sons Franklin and George. The expressions 'shall die without lawful issue' and 'having lawful issue at the time of his death' must be considered together as fixing the time when the other sons would take. That time was when Adam should die without issue at the time of his death. The limitation over was after a definite failure of issue, and the particular intent is not defeated by the creation by implication of an estate tail. In a will 'issue' *prima facie* means 'heirs of the body,' and will be construed as a word of limitation; and 'dying without issue,' standing alone, means an indefinite failure of issue. But this construction will always yield to an apparent intent on the face of the will that the words were to have a more restricted meaning, and to be applied to descendants of a particular class, or at a particular time, and not to all the descendants of every generation. Dying without issue 'living at the time of his decease' means a definite failure of issue. 4 Kent's Com. 274. A limitation over to take effect on the failure of issue within a given time will not give rise to an estate tail by implication in the prior taker. The case is to be classed with the exceptions to the general rule that where there is a limitation over in fee after death without issue, or on failure of issue, or words of similar import, the estate of the first taker is a fee tail (Eichelberger v. Barnitz, 9 Watts, 447; Langley v. Heald, 7 Watts & S. 96); and it is governed by Taylor v. Taylor, 63 Pa. 481, 3 Am. Rep. 565; Parkhurst v. Harrower, 142 Pa. 432, 21 Atl. Rep. 826, 24 Am. St. Rep. 507, and Nes v. Ramsey, 155 Pa. 628, 26 Atl. Rep. 770.

The judgment is reversed, and it is directed that judgment be entered for the defendant on the case stated."

STIPULATIONS IN FIRE INSURANCE CONTRACTS AFFECTING THE INSURED'S RIGHT OF RECOVERY.

Shall all statements on the part of the insured in his application for fire insurance which is made a part of the policy contract be taken to be a warranty, and if any one or more of them happen to be false, preclude his right to recover, whether such statements were made inadvertently, fraudulently, or by mistake? Or shall the insurance company which is ordinarily a corporation and has its home office more frequently at a distance from the risk and has no way of making the contract with the insured except by its agents, be bound to pay to the insured, in case of loss, indemnity specified in the policy, even though the assured has inadvertently, fraudulently, or, by mistake, made misrepresentations to the insurer? Is it right to say that where the insured fills out his application on a printed blank, furnished by the insurer or its agent, and filled out at the latter's request and solicitation, whether he understands the purport, the meaning, and the consequences of it or not, shall be bound to the letter of his application? And is it right to say that the insurer must be bound by all acts of its agent whether he does it in good faith or not and in prejudice of his principal's rights, when the insured is in a position to know all the facts and circumstances concerning and material to the risk, when if the home office knew such facts and circumstances, the risk would be declined? It is the purpose of the writer to treat the above subject in the light of the decisions of the higher courts in the several jurisdictions of the United States and give his unbiased opinion as to what the law is on the several phases of the subject.

The consideration that the insurance company receives from the insured is generally measured by the exposures, incumbrances and the interest that the insured has in the property, and when the insured in his application makes statements to the company to induce them to take his risk at a certain premium when such statements are false, the insurer ought not to be held liable on the contract on account of the fraud of the insured. In an open policy the contract for insurance is for indemnity only, and it is very important that the value of the building, the interest of

the insured in the insured property, whether there is any incumbrance on the property or not at the time of taking out the policy or at the time of loss, or any statements concerning and material to the risk, all should be taken into consideration when determining whether or not the insured should be entitled to recover.[1] If the insurance company wishes to protect itself against future transfers of the property, its incumbrances and the like, it must so have it inserted in the policy that any future transfer or incumbrance of the property will avoid the policy, for a warranty by the insured that the present *status* of the property is as stated in the policy, and his application will not bind the assured as to a future *status* of the property. Nor is a waiver on the part of the insurer of a present warranty the waiver of a future warranty.[2] But where the insured accepts a contract for insurance on his property, and a provision of the policy is that he shall not thereafter incumber or mortgage the insured property, he is not precluded from recovering on his contract where a judgment is rendered against him or where a lien is otherwise created on the property by law, as the warranty means a voluntary incumbrance on the part of the warrantor.[3] If the insured warrants that the insured building is only twelve years old, when in truth it is over thirty years old, that the land upon which it is situated is incumbered only to the amount of one thousand dollars when it is incumbered more than twenty-two hundred dollars, and that there are no liens other than mortgages against it, and that there is an out building upon said real estate other than the building insured worth more than four hundred dollars, when it is not worth two hundred and fifty dollars, such warranties are material to the risk, and will release the company from its obligation under the contract.[4] In an action on a policy of insurance against loss by fire, a paragraph of answer set up by the insurer, wherein it is stated that the policy was issued upon the written application of the plaintiff for the insurance, in which application he falsely represented that the buildings were free from incumbrances, when the proof showed that there was a certain judgment against him that was a lien on his property at the time he made the application, sets up a good defense to the action.[5]

A judgment against the owner of land is only a lien on his property for the satisfaction of the amount of the judgment, and the moment that the judgment is paid it ceases to be a lien and incumbrance on his property, and it makes no difference whether it is released of record or not. So where at the time an insured makes an application for fire insurance, he warrants that there is no lien or any other incumbrance of any kind on the property, he will be entitled to recover, even if there happen to be at the time of the loss there appears on the record a judgment unsatisfied which was taken before the making of his application for the insurance, if the proof shows that it was paid off before he made the warranty.[6] But where the insured warrants that the property is free from incumbrances, he will not be entitled to recover, if the proof shows that at the time of the inception of the contract for indemnity and at the time of loss by fire there was a mortgage on the farm to secure his faithful performance of a contract wherein it provided that during the life of the mortgagee the insured shall maintain and support the mortgagee, and such support and maintenance shall equal one-half of the net proceeds of said farm. Such a mortgage is a lien on the land, and gives the mortgagee a right of recovery and foreclosure on the breach thereof.[7] A policy that covers several pieces of personal property of an ascertained valuation, and the insured warrants that if he incumbers any of them the policy shall be void, is good as be-

[1] 59 Cent. L. J. 364-368; 60 Cent. L. J. 284-288.

[2] Milwaukee Mechanics' Ins. Co., Niewedde, 12 Ind. App. 145-148; Evans v. Queen Ins. Co., 5 Ind. App. 198.

[3] Phenix Ins. Co. v. Pickel, 119 Ind. 155; Baley v. Homestead Ins. Co., 80 N. Y. 21.

[4] Phenix Ins. Co. v. Pickel, 119 Ind. 155; Pickel v. Phenix Ins. Co., 119 Ind. 291.

[5] Leonard v. The American Ins. Co., 97 Ind. 299; Wood's Fire Insurance, Sec. 112; Commonwealth Ins. Co. v. Monneger, 18 Ind. 352; Cox v. Ætna Ins. Co., 29 Ind. 586.

[6] Continental Ins. Co. v. Vanlue, 126 Ind. 410; Merrill v. Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184; Hawkes v. Dodge County Ins. Co., 11 Wis. 196; Smith v. Niagara F. Ins. Co., 60 Vt. 682, 6 Am. St. Rep. 144; Chapin v. McLaren, 105 Ind. 563.

[7] Continental Ins. Co. v. Vanlue, 126 Ind. 414; Watertown Ins. Co. v. Grover S. M. Co., 41 Mich. 131; Bryant v. Erskine, 55 Vt. 153; Bethlehem v. Annis, 40 N. H. 34; Soper v. Guernsey, 71 Pa. St. 219; Austin v. Austin, 9 Vt. 420; Seybert v. Pennsylvania, etc., M. F. Ins. Co., 103 Pa. St. 282.

tween the parties, and on a violation of the contract by the insured the insurer is not liable. As where there is a policy covering a barn and its contents, and the insured warrants that he will not incumber any of them, which warranty he violates by having a mortgage placed on the contents of the barn to secure the payment of money when it shall become due, if a fire takes place and the barn and contents are destroyed the plaintiff cannot recover on his policy for the loss of the barn, the contract being entire and undivisible.[8] In order that the insured might prove a waiver of the breach of warranty on his part by the insurer, he must prove that the insurer had an actual notice of the fact, and took no steps to forfeit the policy until after a loss by fire, constructive notice not being sufficient, *e. g.*, if at the time the insured makes his application for insurance he warrants that he has no mortgage on the insured property, when in fact he has, he cannot say that the company had notice, for the mortgage was made a part of record as required by law, this being only constructive notice, and is not sufficient as required under the contract. Even the insured might waive his advantages in that respect if he wishes to do so. The insurer is not bound to examine the public records to ascertain as to whether or not the insured is violating a stipulation in his policy. And the reason for the rule does not come within the violation of the spirit of the law.[9] And it has been held by the Supreme Court of the state of Iowa that recording a mortgage on insured property is not such notice to the insurer as to make its subsequent acceptance of the premiums from the mortgagor a waiver of the conditions in the policy prohibiting mortgaging the insured property without the consent of the insurer.[10]

A fire insurance contract is a personal obligation and does not follow an assignment, for it appertains to the person with whom it is made, and does not run with the property insured.[11] A contract for insurance with the holder of the property expires with the sale thereof, and the vendee cannot recover where the vendor assigns all his interest and title that he may have in the policy. In order to make himself safe with the insurance company in case of loss he must have the company's assent and assignment on the policy or contract, and a verbal assent or assignment is sufficient. But if the company agrees to the transfer of the property and makes a proper assent and assignment of its policy, such acts on its part constitute a new contract, and warranties made by the vendor of the property sold and insured will not preclude the vendee and assignee to recover on his contract with the company, if the proof shows the fact to be that the vendor had caused a mortgage to be placed on the property in violation of his warranty.[12] The insured should not be entitled to recover if, at the time of making the contract, he warranted that he was not in apprehension of an incendiary fire, when the fact of the matter was that he was in such apprehension. This is a very important part of the contract, for if the insurer had known of the fact he would not have taken the risk, for there were good reasons on the part of the insured that there would be a loss within a very short time by that cause.[13] An insurance company has the right to expect that the insured will keep his obligations in the contract, and when the latter warrants that the building which he is about to have insurance placed on is occupied by him and his family, when the evidence shows that the building was a house unfinished and that he did not live in it at all, the insurer should not be held to respond to the insured to the amount that he was damaged by fire.[14] So, where there was an insertion

[8] Fitzgerald v. Atlantic Home Ins. Co., 70 N. Y. S. 552, 61 Am. Dec. 350; Schwinitsch v. American Ins. Co., 48 Wis. 26. But *contra*, see Schutser v. Duchess Ins. Co., 102 N. Y. 260; Woodward v. Republic Ins. Co., 32 Hun (N. Y.), 365; Delaware Ins. Co. v. Harris, 64 S. W. Rep. 867. And I take these to be the better rule, as it will appear to be the more reasonable, and work hardship in but a very few cases.

[9] Schaffer v. Milwaukee Mech. Ins. Co., 17 Ind. App. 204; U. S. Ins. Co. v. Morarity, 36 S. W. Rep. 943; Morotock Ins. Co. v. Pankey, 91 Va. 259, 21 S. E. Rep. 487. And a very important case see Anderson v. Manchester, etc., Assurance Co., 59 Minn. 182, 60 N. W. Rep. 1095, 63 N. W. Rep. 241, 28 L. R. A. 609.

[10] Wicke v. Iowa Ins. Co., 90 Iowa, 4, 57 N. W. Rep. 632.

[11] Nordyke & Marmon Co. v. Gery, 112 Ind. 553, 5 Am. St. Rep. 27; Cummings v. Cheshire, etc., Ins. Co., 55 N. H. 457.

[12] Wilson v. Hill, 3 Met. (Mass.) 66; Fogg v. Middlesex, etc., Ins. Co., 10 Cush. 337; Shearman v. Niagara, etc., Ins. Co., 46 N. Y. 315; Hoper v. Hudson River, etc., Ins. Co., 17 N. Y. 424; Cummings v. Cheshire, *supra;* Wood on Fire Ins., Sections 110 and 366.

[13] Whittle v. Farmville Ins. Co., 3 Hughes (U. S.), 421.

[14] Potsville Mutual Ins. Co. v. Fromm, 100 Pa. St. 347.

on the face of the policy that the house was occupied as a hotel, with a bar and a billiard room attached, when the evidence showed it to be occupied by a saloon, which fact constituted a breach of the warranty, and the insurer is entitled to set up such facts by way of answer to the plaintiff's complaint, and if proven the insured will not be entitled to recover.[15] Unless the applicant for fire insurance is requested to state as to whether or not the property is occupied, he is not bound to volunteer the information. But if the agent of the insurance company through whom the insurance contract is effected has full knowledge of the character of the occupancy, having made a personal inspection of the building, though not for the special purpose of making the contract of insurance sued on, and with such knowledge he misdescribes the risk to the company, the defendant cannot avoid its obligation on the ground that it did not have knowledge of the conditions as to its occupancy. Knowledge on the part of the insurance brokers is knowledge to the company and it is bound.[16] Nor is the warranty broken where the insured warrants that the building insured is occupied as a hotel, when the facts show it to have in addition thereto a bar and a billiard room.[17]

A technical violation of the warranty will not violate the policy, as where the insured warrants that the building is two stories high, when in fact it is shown to be a building of which the main part is two stories high and that there is a shed kitchen which is only one story high.[18] Where the assured agrees in his policy to make an inventory of his stock of goods at least once a year, and keep an account of all goods bought and sold and keep such inventory and account in an iron fire proof safe, and a failure on his part to make such inventory and to keep such account will avoid the policy. But if the company knows such inventory and account are not being made and kept and takes no steps to forfeit the policy, it will not be heard after the loss to say that by reason of the failure of the insured to keep such account and inventory in the manner and style as provided in his warranty that the insurer ought not to be held liable.[19] So, if the insured bought on the market a safe that was represented to be fire proof, and that he believed it to be such, but on having a fire the inventory and accounts were destroyed while in the safe, he has substantially complied with the requirements in his policy and will be entitled to recover.[20] An insurance company may waive any or all stipulations in its contract with the insured as to the right that it has to require the insured to keep all books, inventories and accounts of goods bought and sold. This is a condition precedent, and may be waived by an agent of the company having authority to take risks.[21] Where the insured warrants that he will keep all books concerning his business in a fire proof safe, he has complied with the warranty if he has put the books in what was thought by him to be a fire proof safe, even though the books are destroyed by a fire.[22] In a case where the insurer furnishes a blank to the insured to fill out, and in it is a question asking what kind of material the walls are made of (and if wood leave it unanswered) and the insured answered it that they were brick, it was held in the case of Cox v. Ætna Ins. Co.,[23] that he had substantially complied with his warranty and was entitled to recover, as there was nothing to hinder them from being part wood under the warranty.

A man may act in more than one capacity, and in working in such several capacities he may represent several parties. So, if A is in the employ of B as an attorney and notary at one time, and at a later time in the employ of C as an insurance agent, and while in the employ of C he insures B's property, C does not take notice of facts that A acquired while

[15] Texas, etc., Banking Co. v. Stone, 49 Tex. 4; Baker v. German Ins. Co., 124 Ind. 490; Goddard v. Monitor, etc., Ins. Co., 108 Mass. 56, 11 Atl. Rep, 307; Alexander v. Germania Fire Ins. Co., 66 N. Y. 464; Insurance Co. v. Pyle, Gebhard Fire Ins. Co., 90 N. Y. 220.

[16] Commercial Fire Ins. v. Allen, 1 So. Rep. 202; The Indiana Ins. Co. v. Hartwell, 123 Ind. 177; Wilson v. Minnesota Farmer's Ins. Assn., 16 Ins. Law Journal, 600.

[17] Martin v. State Ins. Co., 44 N. J. Law, 485, 43 Am. Rep. 397.

[18] Wilkins v. Germania Ins. Co., 57 Iowa, 529.

[19] Hanover Fire Ins. Co. v. Dole, 20 Ind. App. 333; Forehand v. Niagara Ins. Co., 58 Ill. App. 161; Citizens' Insurance Co. v. Sprague, 8 Ind. App. 275.

[20] Fire Association of Philadelphia v. Shoert, 100 Ill. App. 553.

[21] Keet-Rountree Dry Goods Co. v. Mercantile Town Mutual Ins. Co., 74 S. W. Rep. 469.

[22] Underwriters' Fire Assn. v. Palmer, 74 S. W. Rep. 603.

[23] 29 Ind. 586.

in the employ of B, nor is he bound and estopped by such knowledge.[24] So, where the insured warrants that if he procures additional insurance it shall void the policy, such warranty is waived by the company where the agent that took the additional insurance and the first insurance were one and the same agents.[25] So, where A is the representative of a company and also the agent for an insurance company, and he takes an insurance on the company's property, and after it has been carried by the insurance company for some time and received its premium the insurer cancels the policy and returns it back to A, who retains it. After A has it in his possession the property insured is destroyed. The company cannot set up a defense by way of answer that the insurance policy was cancelled, for notice of its cancellation by A was not notice of its cancellation by the assured.[26] But where the assured has an agent that represents several companies to represent him, and in case that one company cancels his policy, to place the insurance in another company, such facts make the agent the assured's agent, and when the company that claims that he had other insurance on his property, in violation of a provision of the policy against other insurance, if the facts go to show that there had been other insurance on the property and the company had canceled the policy and it had been returned to the agent that represented the assured.[27] But in all cases where the question is raised as to whether or not the intermediate man is the agent for the insurer or the insured is a question of fact to be determined by the circumstances; for in cases of fire insurance, that justice might be done to both parties in effecting insurance, the agent should be treated either as the agent of the insurer or of the insured.[28]

[24] Shaffer v. Milwaukee Mech. Ins. Co., *supra*; Union National Bank v. Germania Insurance Co., 71 Fed. Rep. 473; Trenton v. Patten, 46 Minn. 298, 49 N. W. Rep. 129.

[25] Insurance Company of N. A. v. Coombs, 19 Ind. App. 331-340-341; Wood on Fire Insurance, p. 563.

[26] Edwards v. Sun Insurance Co. (Mo. App.), 73 S. W. Rep. 886.

[27] Hamm Realty Co. v. N. H. Fire Insurance Co. (Minn.), 87 N. W. Rep. 933, and cases there cited.

[28] J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co. (N. J.), 54 Atl. Rep. 458. And I also consider it worth while to examine the cases of Bradley v. German-American Ins. Co., 90 Mo. App. 369; Snyder v. Commercial Ins. Co. (N. J.), 54 Atl. Rep. 509, and for a well reasoned case read Fire Ins. of Philadelphia County v. Sinsabaugh, 101 Ill. App. 55.

It seems to be the unquestioned principle in construing fire insurance contracts that notwithstanding the conditions in the policy, if after the insurance contract has become binding on both parties, there existed conditions, uses or incidents of the risk which were in conflict with the warranties in the policy, and which were known to the insurer or its agent, whose knowledge is binding on the company and imputable to it, such conditions, uses or incidents cannot be used to prevent the insured from recovering on his contract.[29]

ROY ELIAS RESSLER.

Windfall, Ind.

[29] Havens v. Home Insurance Company, 111 Ind. 90, 25 Cent. L. J. 368.

FRAUD AND DECEIT—LAND SALES—CAVEAT EMPTOR.

JUDD v. WALKER.

St. Louis Court of Appeals, March, 1905.

Where vendor of land deliberately and falsely represented a tract of land as containing 178 acres when in fact said tract contained only 153 acres, the vendee may recover from the vendor the value of the acres sold in excess of those actually received, and the doctrine of *caveat emptor* is no defense even though the vendee saw the land.

This is an action at law on an allegation o fraud and deceit for the sale of lands. The facts in the case develop that Mr. Bourland, acting as agent for Mr. Judd the plaintiff, in the purchase, was shown two tracts of land supposed to contain one hundred and seventy-eight acres, one of the tracts being somewhat irregular in shape, containing ninety-eight the other eighty acres. To estimate the number of acres in the irregular tract was difficult, but being assured by one Walker, a real estate agent having the land for sale, that the two tracts contained 178 acres of land, Bourland, upon securing Judd's approval by telegraph, closed the deal and a deed was made by which the land was sold for $40.00 per acre to Judd. The owner of the land when Walker sold to Judd was one Naxara, who knew there were not 178 acres in the tract, but was persuaded by Walker to give a deed for that number of acres, upon the assurance of Walker, that he (Walker) would make him (Naxara) secure in case the fraud was discovered. Naxara received pay for 160 acres of land and Walker 18 acres at $40.00 per acre and his commission.

Some time thereafter Judd caused the lands to be surveyed, discovering thereby that the land

contained but 153.24 acres instead of 178 acres, there being a shortage of 24.76 acres. It appears that Walker so self-satisfied with his business ability confided to a witness in the case, at the time of the sale, that he was getting pay for something like 27 acres more than the tract contained. Judd brought suit to recover $40.00 an acre for 24.76 acres. The defendants set up a plea of *caveat emptor*. The court instructed the jury upon the strength of the case of Mires v. Summerville, 85 Mo. App. 183, to bring in a verdict for defendants, and an appeal was taken to the St. Louis Court of Appeals.*

NORTONI, J.: 1. There are cases which hold that where the parties go upon the land during negotiations and the seller points out the true boundaries thereof to the purchaser with the statement of the number of acres contained therein, and upon this statement of the acreage the purchaser relies and purchases the land, no action of deceit can be maintained by the injured party on account thereof. The reason assigned in these cases seems to be two-fold; first, that parties ought not to rely on such statements, and second, that the parties were upon the land and the means of information were equally open to both, therefore the rule *caveat emptor* applies, as the true number of acres could be ascertained by ordinary vigilance on the part of the purchaser. This doctrine is announced in the following cases: Gordon v. Parmalee 2 Allen (Mass.), 212; Mooney v. Miller, 102 Mass. 217; Credle v. Swindell, 63 N. Car. 305. The Kansas City Court of Appeals, in the case of Mires v. Summerville, 85 Mo. App. 183, followed the Massachusetts case of Gordon v. Parmalee, *supra*, and applied the same rule to the case there in decision. In that case as reported, however, it does not appear tha the seller pointed out the true boundaries of the land and this seems to be the principal fact upon which the judgments were predicated in the cases above cited. In fact, the Kansas City Court of Appeals, in the case mentioned, carried the doctrine of *caveat emptor* to its extreme limit if not beyond it, and we are confronted with their adjudications in the present controversy. After much careful and painstaking investigation, we are satisfied that the law is quite generally established throughout those jurisdictions where the common law obtains, to the effect that false statements and representations made by the vendor, positively as of his own knowledge as to the number of acres in a certain tract of land when the tract is being negotiated by the acre, are not regarded as expressions of opinion, but on the contrary, are considered statements of fact, and as such, constitute fraud. This is certainly the doctrine of our supreme court. McGhee v. Bell, 170 Mo. 121; (See also dissenting opinion, 170 Mo. 150-151); Buford v. Caldwell, 3 Mo. 335; Hitchcock v. Baughan, 44 Mo. App. 42; Brooking v. Shinn, 25 Mo. App. 277; Leicher v. Keeney, 98 Mo. App. 394; Starkweather v. Benjamin, 32 Mich. 305; Dunn v. White's Admr., 63 Mo. 181; Foster v. Kennedy, 38 Ala. 359; Beardsley v. Duntley, 69 N. Y. 577; Coon v. Atwell, 46 N. H. 510; Whitney v. Allaire, 1 N. Y. 305; Clark v. Baird, 9 N. Y. 183; Weatherford v. Fishback, 4 Ill. 170; Griswold v. Gebbie, 126 Pa. St. 353; Hill v. Browser, 76 N. Car. 124. This view has become almost universally recognized and adopted by the courts throughout the country. The generally accepted doctrine on the subject is thus announced in the 14 Amer. & Eng. Ency. of Law, 2d Ed., 45: "Statements as to Boundaries and Acreage.—There are some cases in which it has been held or said that a false statement as to the boundaries of a tract of land, or as to the number of acres which it contains, will not support an action of deceit, but they base the rule on the ground that such statements ought not to be relied upon, and not on the ground that they are expressions of opinion. Statements as to such matters, if made by a person positively, and as of his own knowledge, are statements of fact, and have often been held to constitute fraud."

In fact, the rule announced above is the same which applies in cases of fraud and deceit generally and is to the effect that the party owning the property or article, is presumed to know the facts. No one has prevented him from knowing them and one dealing with him has the right to rely upon the positive statements and representations of fact pertaining thereto, even though the means of knowledge were specially open to him, provided the representations were relied upon and were sufficient to and did actually induce action, for the law will not hear the guilty party say, "You were yourself guilty of negligence," or "You ought not to have trusted me." Bigelow on Frauds, 523-524; Kerr on Frauds (2d ed.), 40-42; Cottrill v. Krum, 100 Mo. 397; Barker v. Scudder, 56 Mo. 272; Carter v. Black, 46 Mo. 384; Buford v. Caldwell, 3 Mo. 477; Smithers v. Bircher, 2 Mo. App. 499.

2. This case reeks with fraud. The evidence shows conclusively that Walker made positive representations to Bourland as to the number of acres in the tract from the inception of the trade up to the time of drawing the contract, at which time he suggested that as he was not sure of the exact number of acres in excess of ninety, they would call the irregular tract ninety acres in round numbers, leaving the impression that in the interim, prior to the making of the deed, he would ascertain the true acreage. Bourland relied upon what he said and trusted to him to make good his representations. Walker himself drew the deed for one hundred and seventy-eight acres, and procured his principal's signature thereto by giving to him an obligation of indemnity as mentioned, and collected the cash for the full number of acres as represented by him in the first instance, knowing at the time that he was then and there perpetrating a heinous fraud upon the purchaser. It would seem that in a case of

* Statement of facts much curtailed for want of space.

such gross deception a recovery should be had without much difficulty. The respondent contends, however, that inasmuch as Bourland went upon the land twice and viewed the same, the parties were then upon an equal footing, and means of knowledge being open to him, the rule of *caveat emptor* applies; that it was the purchaser's duty to use his senses and vigilance and ascertain for himself the true facts and not having done so, a recovery is precluded. The cases of Mires v. Summerville, Mooney v. Miller, Gordon v. Parmalee and Credle v. Swindell, *supra*, are cited and relied upon as supporting this contention. Chancellor Kent says:

"The common law affords to every one reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of idolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith, to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to these points, where attention would have been sufficient to protect him from surprise or imposition, the maxim, *caveat emptor*, ought to apply." 2 Kent's Comm. (14th ed.), 484-485.

The true test of the application of the rule *caveat emptor*, is the liability of the defect complained of to the observation and judgment of one exercising ordinary and usual business attention, care and circumspection; that is, such care and attention as is usually exercised by ordinarily prudent men in like business affairs. The law requires this much and no more. It does not require nor expect the purchaser to exercise a degree of care and prudence greater than business men ordinarily exercise in like transactions. The rule is a reasonable one and its chief purpose is to require men to see and know such things as are open and patent to their senses upon penalty. It is where the defect complained of is open and patent to the senses of one exercising ordinary business care and attention only that the rule of *caveat emptor* applies. 2 Kent's Comm. (14th Ed.), 479-484; Weatherford v. Fishback, 4 Ill. 170; Starkweather v. Benjamin, 32 Mich. 305. The rule mentioned has been carried to its full extent in this state. In Morse v. Rathburn, 49 Mo. 91, the alleged false representations were that certain unimproved portions of the farm were well timbered and that the soil was good, whereas most of the timber had been cut off and the land was broken and rocky. The plaintiff, having been over the lands during negotiations, the court very properly denied a recovery by the application of the rule aforesaid, on the ground that the matters about which the alleged false representations were made were open to the observation of the purchaser. To the same effect is the case of McFarland v. Carver, 34 Mo. 195, in which case the fraud and deceit alleged was as to certain representations regarding the quality of the lands and it appeared that one hundred and twenty acres thereof were subject to overflow. The court held that if the defect was patent to observation, no recovery could be had therefor. Respondents press the case of Langdon v. Green, 49 Mo. 363, upon us and insist that it is in point here. In that case, the rule of *caveat emptor* was applied and recovery on account of false representations was defeated. By a careful perusal of that opinion, it will be observed that the case is quite different from the one at bar. There the misrepresentations complained of (in so far as the land was concerned) were that "only a certain amount of the land had been washed away by the Missouri river" (*l. c.*)365), wheras a larger quantity had been washed away. And at page 370, it is shown that the complaining party was familiar with the premises and had had the same in his hands for sale as agent for several months immediately prior to his purchase. It was upon this state of facts that the rule of means of knowledge was applied and we think, properly, as in that case the complaining party being familiar with the premises, the amount of land washed away by the river was patent, the defect was open to the senses of the purchaser and the rule *caveat emptor* ought to apply. It was a proper case for its application as we understand the law, for it goes without saying that a man may look over a piece of land and discover about how much it is damaged by the washing away of the soil, whereas it would be quite impossible for him to look at a tract and say how many acres are contained therein. That case is not an authority on the state of facts now under consideration. Each of these cases, and in fact all of the well considered cases, treat of the rule as one resting upon reason and applying only where the matters complained of were equally open to the senses of the parties and liable to discovery by the exercise of ordinary business capacity, and in fact, it is said the principle is not applicable at all where there is a positive misrepresentation of a fact essential and material to the subject in question and proper diligence has been used by the purchaser in the course of the transaction, and proper diligence is only such diligence as is usually employed by prudent men in like affairs. Kerr on Frauds (2nd Ed.), 42, 14 Amer. & Eng. Ency. Law (2nd. Ed.), 119. On the other hand, in Stebbins v. Eddie, 4 Mason, 414 and 420, Judge Story says: "Where the sale is fair and the parties are equally innocent, there is little of any hardship and much convenience in holding to the rule of *caveat emptor*." We might add here that the general doctrine laid down in the books as elementary is that the doctrine of notice and means of knowledge has no application where distinct

and positive representations of fact have been made, have been relied upon and have induced action. Kerr on Frauds (2nd Ed.), 40, 41; Bigelow on Frauds, 533, 534; Heman v. Hall, 140 Mo. 270; Cottrill v. Krum, 100 Mo. 404.

Entertaining these views, we are fully persuaded that the case under consideration is not one where the rule should find application. To apply it here, we must find that the alleged shortage of acres in the tract was open and patent to the observation of the purchaser and within the range of his senses while viewing the lands. This we cannot do as it is a matter of common knowledge that a man cannot view a tract of land and arrive at anything like an accurate estimate of its contents. As said by the Supreme Court of Michigan: "It cannot be generally true that a person can judge of the contents of a piece of land by the eye." Starkweather v. Benjamin, 32 Mich. 305. See also McGhee v. Bell, 170 Mo. 121, where in both opinions, this case is quoted and approved (majority opinion, *l. c.* 135); dissenting opinion, *l. c.* 150, and also cited approvingly by the Kansas City Court of Appeals in Leicher v. Keeney, 98 Mo. App. 394, a case more recent than Mires v. Summerville, *supra*.

3. Considering the next proposition that Bourland having viewed the lands, he should have used vigilance to ascertain the fact of acreage. To follow out this suggestion, a survey would have been necessary. The rule only requires that Bourland should use that degree of business circumspection usually exercised by prudent men in like transactions. This being true, he would be chargeable with neglect in that behalf only in event that prudent men usually cause surveys to be made under like circumstances. In dealing with this suggestion, we must apply a degree of comman sense commensurate with the case in hand and view it in the light of common knowledge and every day experience pertaining to like affairs. From these bearings we all know that land in large tracts is bought and sold almost daily by the acre in this country without surveys. This arises no doubt from the fact that the original government surveys are usually accurate and men rely thereon, together with the presumption usually indulged that he who owns lands knows the acreage, and the negotiations are generally had on the faith of prior surveys and representation of the owner. The citizens of Missouri from time immemorial, have been accustomed to deal with the utmost good faith in matters of this kind and it would be a sad commentary indeed upon the moral sense and integrity of the state for the courts to say even by inference that our citizens can no longer be trusted in this behalf. Our conclusion is that in case of positive representation of a given number of acres in a tract, ordinary business prudence does not require a survey and measurement thereof and that the party relying upon such representations of fact is not precluded from recovery by not causing measurements to be made in advance of the purchase. The words "means of knowledge easily within reach" employed in some of the cases ought not to be construed to require the purchaser to seek out and employ a surveyor for the purpose of verifying a fact positively asserted by the seller.

4. There is yet an additional reason why this case should have gone to the jury. Respondents were in no position to avail themselves of appellant's want of care and lack of attention. The general rule seems to be well settled that where the parties deal fairly or at arm's length, the rule of *caveat emptor* as above indicated applies, but when fair dealing is departed from by the vendor making false statements of fact as of his own knowledge, the falsity of which is not palpable to the purchaser, the purchaser has the undoubted right to rely implicitly upon such statements and the principle stated has no application (authorities *supra*) and in event the purchaser is entrapped thereby and afterwards calls upon the vendor in a court of justice to make compensation for his deceit, the law will not permit him to escape by urging the folly of his dupe nor by admitting that he, the seller, was a knave and a scoundrel, and averring the defrauded party was negligent and careless in thus believing and trusting him, for this would be equivalent to saying, "you trusted me, therefore I have a right to betray you." Cottrill v. Krum, 100 Mo. 397; Leicher v. Keeney, 98 Mo. App. 394; Fargo Gas Light & Coke Co. v. Fargo Gas & Electric Co., 4 N. Dak. 219, 37 L. R. A. 593; Nead v. Bunn, 32 N. Y. 280; Redding v. Wright, 49 Minn. 322; Linington v. Strong, 107 Ill. 302; Labbe v. Corbett, 69 Tex. 509; Watson v. Atwood, 25 Conn. 320; Maxfield v. Schwartz, 10 L. R. A. (Minn.) 607; Graham v. Thompson, 55 Ark. 299; Kiefer v. Rodgers, 19 Minn. 38; McGhee v. Bell, 170 Mo. 121. On this question Mr. Bigelow states the law thus: "The proposition has now become very widely accepted, at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge were specially open to him, or though he had legal notice, as *e. g.* in the public registry, of the real state of things. It may be improbable that a man with the truth in reach should accept a representation made in regard to it, but the improbability can be no more than a mattter of fact. If the representation were of a character to induce action, and did induce it, that is enough. It matters not, it has well been declared, that a person misled may be said, in some loose sense, to have been negligent (in reality negligence is beside the case where the misrepresentation was calculated to mislead, and did mislead) for it is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or 'you were yourself guilty of negligence.' This indeed appears to be true even of cases in which the injured party had in fact made a partial examination. Nor is the rule applicable merely to cases which in some respects stand

upon special ground, as *e. g.*, suits for specific performance; it applies to rescission equally, and indeed is a general rule." Bigelow on Frauds, 5-23. 5-25. Mr. Kerr, in his work on Frauds (2nd Ed.),40 41, says: "If a definite or particular statementbe made as to the contents of property. and the statement be untrue, it is not enough that the party to whom the representation was made may have been acquainted with the property. A very intimate knowledge with the premises will not necessarily imply knowledge of their exact contents, while the particularity of the statement will naturally convey the notion of exact admeasurement. The fact that he had the means of knowing or of obtaining information of the truth which he did not use is not sufficient. It is not indeed enough that he may have been wanting in caution. A man who has made false representations, by which he has induced another to enter into a transaction, cannot turn round on the person whom he has defrauded and say that he ought to have been more prudent and ought not to have concluded the representations to be true in the sense which the language used naturally and fairly imports. Nor is it enough that there may be circumstances in the case which, in the absence of the representation, might have been sufficient to put him on inquiry. The doctrine of notice has no application where a distinct representation has been made. A man to whom a particular and distinct representation has been made is entitled to rely on the representation and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn. He is not bound to inquire unless something has happened to excite suspicion, or unless there is something in the case or in the terms of the representation to put him on inquiry. The party who has made the representation cannot be allowed to say that he told him where further information was to be got, or recommended him to take advice, and even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other. No man can complain that another has relied too implicitly on the truth of what he himself stated."

The doctrine of the two learned authors above, is evidently both sound and just and it is the doctrine of our supreme court on the subject as appears from Cottrill v. Krum, 100 Mo. 397, as well as McGhee v. Bell, 170 Mo. 121.

5. The cases of Dunn v. White's Admr., *supra*, Green v. Worman, 83 Mo. App. 568, and Hitchcock v. Baughan, 36 Mo. 218, cited and relied on by respondents are not in point here. Those cases are treated by the courts as belonging to that class in which no actual fraud is shown and the controversy arose out of honest error and mistaken opinion, as where the parties being on the land and the seller informs the purchaser that he did not know where the boundaries were, but pointed out what he thought to be such, such statements instead of being treated as a positive statement of fact, it is held, amounted to no more than an honest expression of opinion and was evidently so understood by the parties at the time, and inasmuch as the purchaser knew as much about the boundaries as did the seller and the seller did not attempt to make any positive representations of fact pertaining thereto, a recovery at law could not be had thereon. Notwithstanding the very high opinion we entertain of the Kansas City Court of Appeals and the very great esteem in which we hold the learned judge who wrote the opinion in the case of Mires v. Summerville, 85 Mo. App. 183, after much careful and painstaking investigation and mature deliberation, we are constrained and persuaded to hold that the facts in this record make a proper case for the jury and that the learned trial judge erred in peremptorily directing a verdict for the respondents.

6. It is conclusively shown that while the respondent, Naxara, may have taken no part personally in the fraudulent representations, he became aware of the fraud being perpetrated in time to prevent it, but instead of so doing, deliberately became a party thereto by executing a deed purporting to convey more land than he owned or claimed to own and took an obligation from his agent, Walker, to protect himself in event the fraud was discovered and he would be called upon for reimbursement on account thereof. He also accepted compensation for more land than he owned, all of which appears from his own testimony. It is a familiar principle that false and fraudulent representations of an agent, when acting within the scope of his authority, binds his principal, and to represent the acreage of a tract of land in his hands for sale is within the scope of authority of a real estate agent beyond question. It is likewise familiar law that a principal cannot take any benefit arising by virtue of the false and fraudulent representations of his agent, within the scope of his authority, although he may have been no party to the representations. He cannot adopt and take benefit for a contract or sale brought about and entered into by such fraud of the agent on his behalf, and at the same time repudiate the fraud upon which the transaction was built. The statements and representations in this case were clearly ratified and adopted by Naxara and he is jointly liable with Walker therefor. Kerr on Frauds (2nd Ed.), 82; Greene v. Worman, 83 Mo. App. 568; Griswold v. Gebbie, 126 Pa. St. 353; Morse v. Rathburn, 49 Mo. 97; Short v. Stephens, 92 Mo. App. 151.

7. Bourland had no interest in the subject of this controversy and is not a necessary party to the suit. For the reasons above given, the judgment is reversed and the cause remanded to be proceeded with as herein indicated. It appearing that the views entertained by this court and herein announced are contrary to and in conflict

with those expressed by the Kansas City Court of Appeals in the case of Mires v. Summerville, 85 Mo. App. 183, this ase is therefore certified to the supreme court for final determination, in accordance with the constitutional mandate in that behalf provided. It is so ordered.

NOTE.—*Fraud and Deceit—Caveat Emptor in Sale of Land—Damages.*—It is unfortunately true that some of the opinions of our courts are such that fraud may escape under their shelter. Not that the judges who render them intended to so provide for fraud, but in the use of principles there has been a lack of that discrimination which goes to make up the truly useful precedent. Great opinions are those which tend to promote a high degree of honor among men, in all their business transactions. We have been passing through a period where business methods have not been formed out of regard for those principles which mark the actions of men of high character. Take the case of Gordon v. Parmalee, 2 Allen, 222, a Massachussetts case, which seems to have been the basis of the Kansas City court's opinion, where a man sold a piece of ground by metes and bounds, falsely representing it to contain 50 acres when he knew in fact that it only contained 28 acres. The purchaser knew the land and went over it before purchasing it, but undertook to excuse himself for not seeing there was not fifty acres by saying the land was so uneven that its actual extent could not be seen from any one point. After disposing of his representations as to quality which appeared in the case, the supreme court of the state said: "The representations concerning the quality of the land which formed the subject of the contract come within the same principle. The vendors pointed out to the vendees the true boundary lines of the land which they sold. This fact is established by the verdict of the jury under the instructions given at the trial. The defendants, therefore, had the means of ascertaining the precise amount of land included within the boundaries. They omitted to measure it or cause it to be surveyed. By the use of ordinary vigilance and attention they might have ascertained that the statements concerning the number of acres, on which they placed reliance, were false. They cannot now seek a remedy for placing confidence in affirmations which, at the time they were made they had the means and opportunity to verify or disprove." Here we have the statement of one of the parties that the land was so uneven it was impossible to see it all at one time, to be weighed against the fact stated that the vendor "falsely represented the tract to contain 50 acres when he knew it contained only 28 acres." It seems to be giving a premium to false representations, to hold that the vendee, under such circumstances, who was honest enough himself to believe the vendor's statements, in view of the fact that the vendor must make a deed to the tract and undertake to sell fifty acres of land. It seems to us that the Kansas City court was more influenced by the glare of the cases presented than by the deeper consideration of principles. It is certain that two legal principles were arrayed against each other. The one, *caveat emptor*, the other, no one may take advantage of his own wrong. The question is which of these should have the precedence. We admit that there are circumstances where it is no more than just that the doctrine *caveat emptor* should apply. We do not see how it is possible that such a doctrine has anything whatever to do with a case where one man makes a statement that a tract of land contains a certain number of acres, and although the other views it, if he relied on the statements made him, as to the number of acres, and paid for that number of acres, it would be infinitely better from a moral standpoint, to allow him to recover back the overplus paid because of the false and fraudulent representations, than to allow the other party to reap the advantage of his own wrong. Take the facts which were the basis of the Kansas City court's opinion:

The plaintiff bought a tract of land of defendant receiving from him a warranty deed therefor, reciting a consideration of $380 and describing the land as follows: "The north half of the northeast quarter lying north of the Grand River, of section 28, Township 57 of Range 23 in Livingston County, Missouri, containing 31.78 acres, more or less." There were in fact only 17 acres in the tract. Plaintiff claimed that he bought the land at $12.50 per acre and that the defendant falsely and fraudulently represented to him that there were the number of acres mentioned in the deed, knowing that there were only 17 1-2 acres. It is common knowledge that it is the custom, and that thousands of transactions conveying real property are made, the vendee entirely relying on the representations of the vendor as to the number of acres of land in a tract. The complaints of fraud are comparatively few. It is frequently the case where it is not easy to determine whether there are eighteen or 30 acres in a tract, even though a party may have been born within three miles of it and walked over it before purchasing. Such cases are no more to be compared to cases where a man sells a horse as a white one and the vendee goes and looks at it, and afterwards complains because he discovered later that the horse was black, than moonlight is to be compared to sunlight. We do not believe that the Supreme Court of the United States would sustain either the Kansas City court's opinion or that of the Massachusetts court. We say to hold the vendee in such a case responsible for negligence rather than the vendor, who was guilty of a deliberate plan to get something upon false representation which succeeded, is hard to reconcile with dignified opinion. The very fact that a person undertakes by a solemn compact to convey a certain number of acres of land, throws purchasers off their guard, and to hold that the person so undertaking is not bound by his agreement to do a certain thing, is absolutely against principle. The law is made to command what is right and prohibit what is wrong and to be effective must, at the same time, command what is right and prohibit what is wrong. This Mr. Justice Nortoni's opinion does. The Kansas City Court of Appeals does not even consider the cases which might have been used to conform its opinion to justice. An attempt is made to bring the opinion of the Supreme Court of the United States to the support of its opinion but the fact is that the opinion of the Supreme Court of the United States cited by the Kansas City Court of Appeals was a steamboat case. In that case the purchaser, before the contract was executed, went to New York from Baltimore, where he resided, for the purpose of examining the steamer, taking with him two ship carpenters and his son, who was afterwards captain of the vessel, and whilst they were in New York, every opportunity was given them to examine the vessel from one end to the other. Slaughters Administrators v. Gerson, 13 Wall. 379. One thing is certain, that, in citing the steamboat case as analogous to the one the court had in hand, the court

could not be accused of being hide-bound in following case law.

This same question was considered in Vol. 60, p. 421, of CENTRAL LAW JOURNAL. The facts were similar excepting that in the case there reviewed, there was a much larger tract of land involved and certain sections were included in the sale of it, to which the vendor had no title whatever. The case referred to is Walker & Co. v. Walbridge, 136 Fed. Rep. 19, decided in the United States Circuit Court of Appeals. It was held there that a recovery could be had for the value of the land the defendant had fraudulently conveyed, to which he had no title. In that case the doctrine of *caveat emptor* was not raised, but the court in referring to the fraud used the following language: "The fraud consists in the party stating that he knows the thing to exist, when he does not know it to exist; and, if he does not know it to exist, he must ordinarily be deemed to know that he does not," and on p. 24 *id*, we find the following: "In the case of Labbe v. Corbett, 69 Tex. 509, 6 S. W. Rep. 808, the Texas Supreme Court, adopts the rule as asserted in the case of Railway Company v. Kisch, L. R. 2 H. L. 120, and states the rule as follows: 'When once it is established that there has been a fraudulent misrepresentation * * * by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, to tell him he might have known the truth by further inquiry. He has a right to retort upon his objector: "You, at least, who have stated what is untrue * * * for the purpose of drawing me into a contract, can not accuse me of want of caution because I relied implicitly upon your fairness and honesty,"' and makes this comment: 'The rule is well sustained by reason and authority.'"

We greatly commend the above language used by the highest court of appeals in England, which fully sustains the principal case. We find, however a quotation from the case of Leicher v. Keeney (Mo. App.), 72 S. W. Rep. 145, which was taken from the head notes and which is impossible to reconcile with the above quotation from House of Lords, in view of the fact that Leicher v. Keeney distinguishes Mires v. Summerville, *supra*, from the opinion therein maintained. We quote the following therefrom: "A vendee relying upon the vendor's fraudulent representations as to some specific fact affecting the value of the land may, upon the discovery of the fraud stand by the purchase and sue for the fraud. Where a vendor's fraudulent representations relate to the quantity of land sold, it is immaterial whether the sale is in gross or by the acre. The doctrine that a written contract is conclusively presumed to merge all prior negotiations, so as to exclude parol evidence of previous negotiations, does not apply to an action based on defendant's fraud in procuring the contract. The representations of a vendor that a tract of land contained 160 acres while it contained 18 acres less, is a material representation. A vendor sued by a vendee for fraudulent representations inducing the vendee to purchase a tract of land, can not defend by showing negligence on vendee's part, where the negligence was caused by vendor's own misconduct." This language certainly is as applicable to a case like the principal case, as it is to the facts to which it was made to apply. While it is true that in Mires v. Summerville, *supra*, the purchaser had always known the tract of land and had passed over it, yet he may never have given a thought to the question as to how many acres it contained, till he went to buy, and then relied upon the vendor's statement that it contained what he stated. It was not necessary for him to make a survey for he had a right to rely on the statement as one of fact, and the reply which the English court says might have been made that, "you at least who have stated what is untrue, for the purpose of drawing me into the contract, can not accuse me of want of caution because I relied implicitly upon your fairness and honesty," is apropos of the principal case. Anyway, the great weight of authority is against Mires v. Summerville, as shown in Mr. Justice Nortoni's able opinion in the principal case, which will no doubt be sustained by the supreme court. The question here arises as to the damages which should be given in such cases as are here considered. There is no doubt but that the law is well settled in England to the effect that "a party defrauded in a contract has his choice of two remedies. He may stand to the bargain, and recover damages for the fraud, or he may rescind the contract and return the thing bought and recover back what he paid." Campbell v. Fleming, 1 Ad. & E. 40. And in the case of W. P. Walker & Co. v. Walbridge, *supra*, the plaintiff was permitted to recover back the amount paid for the land to which no title was given, *i.e.*, the leasehold interest in 11 sections of land. But there is another element which does not seem to have been considered, that is, the expense to which the plaintiff is put, to recover because of the fraud. The law must be viewed from the standpoint that it is made to prohibit what is wrong, and in cases where there is a wilful tort, the wrongdoer, who compels his victim to go to law to recover for his wilful wrong, should be made to pay all the expense of the litigation including attorney's fees. While we have not space at this time to go into the question extensively, we find that in Connecticut "it is settled in actions for fraud, the successful plaintiff may in the discretion of the jury, recover, in addition to the actual damages directly resulting, such sum as will reimburse him for the actual expenses necessarily incurred in obtaining redress." In an Ohio case, the court has said that "the better opinion seems to be that where the act complained of is tainted by fraud, or involves an ingredient of malice or insult, the jury may award proper and reasonable attorney's fees in their estimate of damages. Roberts v. Mason, 10 Ohio St. 277; Peckham v. Harper, 41 Ohio St. 100. Attorneys fees are recoverable in cases of fraud in Kansas. First Nat. Bank v. Williams, 62 Kan 431, 63 Pac. Rep. 744; Sutherland on Damages, sec. 1177. Not only this, but, Mr. Sutherland says, sec. 1178, *id*: "There is not an entire agreement among the authorities on the question whether exemplary damages may be allowed in actions of deceit; nor are the cases numerous where the question has been considered. On the principle upon which such damages are allowed, where the doctrine of punitory damages prevails, it is not easy to see how they are to be excluded, as a matter of law, in cases of wilful and deliberate fraud followed by actual damage." The establishment of such principles is certainly needed, and instead of giving an inducement to the enlargement of the class of real estate sharks, which the opinion of the Kansas City court in question encourages, would have a strong tendency to curtail its numbers, "a consummation devoutly to be wished."

The dissenting opinion of Mr. Justice Shelby in the case of Walker & Co. v. Walbridge, *supra*, lacks that element which should be considered in all cases of fraud that the law is made to prevent what is wrong.

To say that the true rule as to the measure of damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property, is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract, is to enable the party committing the fraud to reap an advantage of his own wrong. It leaves out of consideration that the law ought to take every intendment in favor of the party wronged and against the wrongdoer. Such a rule gives the punitive force which the law implies in cases of fraud.

W. A. GARDNER.

JETSAM AND FLOTSAM.

HEAD OF THE AMERICAN BAR ASSOCIATION.

Since the organization of the American Bar Association, it never had an abler president than the one elected last month. He is the equal in legal ability and literary talent of Oliver Wendell Holmes, Judge of the United States Supreme Court, and, besides this, he has the hard-oil finish of a westerner. He learned the rules of war in battles, studying human nature in the eyes of men, marching against dangers and death, and later he caught the aspirations of pioneer state builders, face to face with his neighbors through the early days of Kansas, some forty years ago. He's a scholar of New England breed, schooled in Wisconsin and educated everywhere. He is authority on law, international, corporation and commercial; he's an author, an orator and a statesman; and above all, he is "one that loves his fellowmen." Though turned 60, Captain George R. Peck, of Chicago, is yet a young man in thought and action, and while the new duty of president of the American Bar Association will add to his work as counsel of the Chicago, Milwaukee & St. Paul Railway Company, he will meet it with that punctuality so characteristic of the man. Capt. Peck has a wonderful capacity for doing things. He is strong in both body and brain and his great mental powers are so trained that his first thoughts on any subject are safe for action; he never goes back to change plans or revise. He thinks and does at once. This accounts for the ground he covers. No public man of to-day does more. And a noticeable thing in George Peck, above others is, he grows bigger and better with years. Nobody hears of him "breaking down;" it is always of his taking on more things to do. He's a many-sided, broad-gauged, high-tempered and gentle-hearted man whose genius for the affairs of the world is based upon brains inherited, and plain work. His greatness is well earned—"the arduous greatness of things done rather than of things written or said."—*Western Spirit.*

BOOK REVIEWS.

MAY'S CRIMINAL LAW.

May's Criminal Law has just passed to the 3d edition. This edition is edited by Harry Augustus Bigelow, assistant Professor of Law in the University of Chicago. This is a brief treatise intended primarily for students and while not pretending to be an exhaustive discussion of criminal law is yet a valuable contribution upon the subject, and will be found to be well adapted to the needs of the profession in general. The first edition published in 1881 was revised and enlarged by Professor Beale of the Harvard Law School, a fact which gives assurance that the work is of the highest order. The clearness and conciseness of the first edition is fully maintained in the second, and the arrangement of the 3d is that of the second, bringing it down to date by enlarging the number of examples and citing the latest cases. These cases emphasize the general principles of the criminal law underlying all its branches, such as the co-existence of act and intent, specific intent, constructive intent, negligence, effect on criminal responsibility, of mistake of fact, or ignorance of the law. The principles of the particular crimes have also been stated more at length wherever it was deemed advisable. The number of citations has been doubled, and references to the National Reporter System and to Champlin's, Mickell's and Kenny's collection of cases on criminal law have been added. Its true value is best stated in the language of William C. Robinson, former Professor of Criminal Law, etc., in Yale Law School:

"This work is certainly one of distinguished merit. Its definitions and statements of principles are clear and concise. Its discussions of doubtful or controverted points are calm and scholarly. Both as a *vade mecum* for the criminal lawyer and as a text-book for the student, it must at once take a high position in the literature of that branch of jurisprudence."

It is contained in 366 pages and may be had in buckram for $3.00 and in sheep $3.50. It is published by Little, Brown & Co. of Boston, which is a guarantee of excellent workmanship.

HUMOR OF THE LAW.

CASE FOR THE COURT'S RULING.

Going down Chesapeake bay on an excursion when the wind was fresh and the white-caps tumultuous, Judge Hall, of North Carolina, became terribly seasick.

"My dear Hall," said Chief Justice Waite, who was one of the party, and who was as comfortable as an old sea-dog, "can I do anything for you? Just suggest what you wish."

"I wish," groaned the sick jurist, "that your Honor would over-rule this motion."

HIS CLIENT WON THE CASE.

The late Charles P. Thompson of the supreme court at one time in his practice had a client named Michael Dougherty, who had been arrested for the illegal sale of liquor. The police had no evidence except one pint of whisky, which their search of his alleged kitchen bar-room revealed. In the superior court this evidence was produced and a somewhat vivid claim made of *prima facie* evidence of guilt by the prosecuting attorney. During all this Mr. Thompson was silent. When his turn came for the defense he arose and said:

"Michael Dougherty, take the stand." And "Mike," with big red nose, unshaven face, bleared eyes and a general appearance of delapidation and dejection, took the stand.

"Michael Dougherty, look upon the jury. Gentlemen of the jury, look on Michael Dougherty," said Mr. Thompson. All complied. Mr. Thompson himself, silently and steadily gazing at "Mike" for a moment, slowly and with solemnity, turned to the jury and said: "Gentlemen of the jury, do you mean to say to this court and to me that you honestly and truly believe that Michael Dougherty, if he had a pint of whisky, would sell it?"

It is needless to say "Mike" was acquitted.—*Boston Herald.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACTION—Joinder of Causes.—A declaration held to state a cause of action arising out of the same transaction or transactions connected with the same subject-matter, so that they could be united in the same complaint, under Rev. St. 1898, § 2647.—Emerson v. Nash, Wis., 102 N. W. Rep. 921.

2. ADVERSE POSSESSION—Color of Title.—In order to show adverse possession under color of title, the land must be within the boundaries of the deed conferring such color of title.—Marshall v. Corbett, N. Car., 50 S. E. Rep. 210.

3. ADVERSE POSSESSION—Constructive Possession.—Occupation by one of land which he owns under a deed held not constructive occupation of other land, conveyed by the deed, to which the grantor had no title.—Proctor v. Maine Cent. R. Co., Me., 60 Atl. Rep. 423.

4. ADVERSE POSSESSION—Overlapping Surveys.—One claiming under a deed to an overlap of a junior on a senior survey must show possession of at least part of the overlap.—McLemore v. Lomax, Tex., 86 S. W. Rep. 635.

5. ALTERATION OF INSTRUMENTS—Fraudulent Removal of Word Trustee from Deed.—Alteration of deed by striking out the word "trustee" after the name of the grantor held a forgery, rendering the deed void.—Flitcraft v. Commonwealth Title Ins. & Trust Co., Pa., 60 Atl. Rep. 557.

6. ANIMALS—Agister's Contract.—Where the contract of an agister is for the care and feeding of a particular herd of cattle, evidence descriptive of that herd is admissible, without special reference to that subject in the pleadings.—Darr v. Donovan, Neb., 102 N. W. Rep. 1012.

7. APPEAL AND ERROR—Accord and Satisfaction.—Where, in the county court, defendant interposed the defense of account stated on appeal to the district court, amendment setting up accord and satisfaction was properly stricken out.—Bankers' Union of the World v. Favalora, Neb., 102 N. W. Rep. 1013.

8. APPEAL AND ERROR—Bar by Limitation.—An appellee is entitled to file in the supreme court a plea in bar of the appeal, based on the statute of limitations.—Farmer v. Allen, Miss., 38 So. Rep. 38.

9. APPEAL AND ERROR—Cross-appeal in Equity Proceedings.—An appeal in chancery opens the whole case, and a cross appeal is unnecessary to entitle appellee to reversal of a decree containing prejudicial error.—Ocala Foundry & Machine Works v. Lester, Fla., 38 So. Rep. 56.

10. APPEAL AND ERROR—General Assignment of Error.—Where the portion of the charge excepted to stated a correct abstract proposition of law, the supreme court will not review it under general assignment of error.—Bowles v. Wicker, Ga., 50 S. E. Rep. 476.

11. APPEAL AND ERROR—Inadequacy of Damages.—Verdict for $300 for injuries to locomotive fireman held not so inadequate as to be set aside on appeal.—Gorham v. St. Louis, I. M. & S. Ry. Co., Mo., 86 S. W. Rep. 574.

12. APPEAL AND ERROR—Partnership Dissolution.—Where liquidators of a partnership proceed by rule requiring creditors to show cause why inscriptions should not be canceled, a judgment dismissing the rule is final and appealable.—Fitzner v. Noullet, La., 38 So. Rep. 94.

13. APPEARANCE—Effect of Filing Demurrer.—A demurrer is an appearance in the cause, and by filing it defendant waives all objections to the jurisdiction of the court over his person.—Sayre & Fisher Co. v. Griefen, N. J., 60 Atl. Rep. 513.

14. APPEARANCE—Moving to set Aside Judgment.—An appearance by defendant for the sole purpose of moving to set aside a judgment by default for irregularity, etc., held a general appearance.—Scott v. Mutual Reserve Fund Life Assn., N. Car., 50 S. E. Rep. 221.

15. ASSIGNMENTS—Moneys to Become Due.—On an equitable assignment of money to be earned in the future by the assignor, the assignee acquires no lien on the money unless the assignor has earned it.—Cogan v. Conover Mfg. Co., N. J., 60 Atl. Rep. 408.

16. ATTORNEY AND CLIENT—Bona Fide Purchase of Stock.—One who accepts and pays for certificates of stock indorsed by a blank power of attorney, held not a *bona fide* purchaser, if he had knowledge that the shares were in pledge.—New Jersey Trust & Safe Deposit Co. v. Bodine, N. J., 60 Atl. Rep. 387.

17. ATTORNEY AND CLIENT—Counsel Fees in Suit to Set Aside Trust Deed.—In a suit to set aside a trust deed, a fee of attorney whose services were rendered in support of the deed held properly allowable from the income of certain securities.—Bauernschmidt v. Bauernschmidt, Md., 60 Atl. Rep. 437.

18. ATTORNEY AND CLIENT—Inconsistent Defenses.—A defendant, whose position is in fact adverse to that of another defendant, cannot act as the latter's counsel, unless, if at all, there is an express showing by the record of authorization so to do.—Jenkins v. Barber, Miss., 38 So. Rep. 36.

19. ATTORNEY AND CLIENT—Validity of Transfer of Property to Attorney.—Where an attorney accepts a transfer of property from his client, the burden is on the attorney to establish that the transfer was a fair one and that the client understood its terms and conditions.—Sheehan v. Erbe, 92 N. Y. Supp. 862.

20. AUCTIONS AND AUCTIONEERS—Disclosure of Principal.—Where an auctioneer disclosed the fact of his agency and his principal, the law presumes that he has contracted for the principal.—Mercer v. Leihy, Mich., 102 N. W. Rep. 972.

21. BAILMENT—Care Required of Bailee for Hire.—Where defendant rented an organ of plaintiff, he was bound to exercise reasonable care to guard against injury thereto.—Sinischalchi v. Basilico, 92 N. Y. Supp. 722.

22. BAILMENT—Lien.—The existence of a lien on personal property does not carry with it the right of posession, if the statute otherwise provides.—Ocala Foundry & Machine Works v. Lester, Fla., 38 So. Rep. 51.

23. BANKRUPTCY—Assignments.—Refusal to permit an assignor of the claim sued on to be asked whether he was interested in the suit, to affect his interest as a witness, held error.—Hirsh v. American Dist. Telegraph Co., 92 N. Y. Supp. 794.

24. BANKRUPTCY—Averment of Less than Twelve Creditors.—Where a single creditor files a petition for an

adjudication in bankruptcy, the averment that all the creditors are less than 12 does not affect the jurisdiction of the court.—*In re* Plymouth Cordage Co., U. S. C. C. of App., Eighth Circuit, 135 Fed. Rep. 1000.

25. BANKRUPTCY—Uncancelled Payments.—Where a judgment debtor has been discharged in bankruptcy, the fact that there are uncanceled judgments docketed against him does not render the real estate which he formerly owned unmarketable.—Grosso v. Marx, 92 N. Y. Supp. 773.

26. BENEFIT SOCIETIES—Effect of Subsequent By-Laws on Contract of Insurance.—An amendment to the by-laws of a fraternal order, passed after making a contract of insurance with a member, enters into the contract only as consented to by the member.—Butler v. Supreme Council A. L. H., 92 N. Y. Supp. 1012.

27. BILLS AND NOTES—Transfer After Maturity.—In an action on a note by a holder after maturity, the burden was on a party thereto to establish a special defense of a contract by which the payee agreed to indemnify him from liability.—Citizens' Nat. Bank v. Cammer, Tex., 86 S. W. Rep 625.

28. BOUNDARIES—Deeds.—Where a deed calls to begin at a stake, and afterwards calls for a certain stump, the jury may determine the boundaries by reversing the calls from the stump.—Marshall v. Corbett, N. Car., 50 S. E. Rep. 210.

29. BRIBERY—Building Inspector.—A void arbitration proceeding, instituted after a building inspector had denied an application for a permit, held insufficient to establish that the inspector could not be guilty of accepting a bribe to influence his action.—State v. Dunn, Wis., 102 N. W. Rep. 935.

30. BROKERS—Commissions.—A real estate broker held entitled to recover commissions for making a sale, the purchaser having refused to perform because the owner would not, as agreed, have a partition made —Albritton v. First Nat. Bank, Tex., 86 S. W. Rep. 646.

31. CARRIERS—Delivery.—Consignors cannot sue the carrier for breach of contract, in the absence of evidence to rebut the presumption of ownership of the goods by the consignee.—Dressner v. Manhattan Delivery Co., 92 N. Y. Supp. 800.

32. CARRIERS—Strike as Excuse in Delay of Cattle Shipment.—A carrier is liable for injury to cattle by delay, caused by interference of strikers, only when it fails to exercise reasonable diligence.—Sterling v. St. Louis, I. M. & S. Ry. Co., Tex., 86 S. W. Rep. 655.

33. CIVIL RIGHTS — Apartment Houses. — Apartment house held not a hotel, within Laws 1895, p. 974, ch. 1042, providing that all persons shall be entitled to equal accommodations in hotels.—Alsberg v. Lucerne Hotel Co., 92 N. Y. Supp. 851.

34. COMPROMISE AND SETTLEMENT—Validity.—Where there is a *bona fide* dispute as to the amount due upon a demand, the acceptance in satisfaction of the entire demand of a sum less than was claimed is supported by a sufficient consideration, and precludes a recovery of the balance.—Sims v. Three States Lumber Co., U. S. C. C. of App., Eighth Circuit, 135 Fed. Rep. 1019.

35. CONSTITUTIONAL LAW—Trading Stamps.—A city ordinance requiring merchants giving trading stamps to pay a license in addition to that required by other merchants held in contravention of Const., §§ 1, 35.—City Council of Montgomery v. Kelly, Ala., 38 So. Rep. 67.

36. CONSTITUTIONAL LAW—Wages, Redeemable in Merchandise.—Rev. St. 1899, §§ 8142, 8143, in relation to the issuance of orders for the payment of wages, held unconstitutional, as interfering with freedom to contract.—Leach v. Missouri Tie & Timber Co., Mo., 86 S. W. Rep. 579.

37. CONTRACTS—Exemption of Railroad from Taxation.—An exemption from taxation, granted by special act to a railroad company, held limited to the line of road built under its charter, and not to extend to purchased lines.—Wicomico County Commrs. v. Bancroft, U. S. C. C. of App , Fourth Circuit, 135 Fed. Rep. 977.

38. CONTRACTS—Foreman's Right to Raise Wages of Workman.—Where plaintiff contracted to furnish labor in repairing defendant's house, plaintiff to be reimbursed and paid a per cent., and plaintiff's foreman arbitrarily raised a workman's wages, defendant was not liable for the increased wages.—Westendorf v. Dininny, 92 N. Y. Supp. 858.

39. CONTRACTS—Restraint of Trade.—A contract not to enter into business in competition with a complainant for a term of years, based on a good consideration, may lawfully extend to all territory wherein complainant's trade is likely to go, having regard to the nature of the business.—Knapp v. S. Jarvis Adams Co., U. S. C. C. of App., Sixth Circuit, 135 Fed. Rep. 1008.

40. CONTRACTS—Void as Against Public Policy.—An agreement for the lease of a building for a stipulated rental, with a further consideration that defendants would not prosecute plaintiff's husband for burglary, is void as against public policy.—Graham v. Hiesel, Neb., 102 N. W. Rep. 1010.

41. CORPORATIONS—Accounting by Directors.—On accounting by directors of a corporation with its receiver, a finding that the amount fixed for the salaries of the directors was excessive does not deprive them of the right to an allowance of a reasonable amount.—Miller v. Doyle, Pa., 60 Atl. Rep. 496.

42. CORPORATIONS—Divdends on Collateral.—Liability of assignee of pledgee to account to pledgor for dividends on collateral pledged, collected by original pledgee after assignment, determined.—Maxwell v. National Bank of Greenville, S. Car., 50 S. E. Rep. 195.

43. CORPORATIONS — Objections to Receiver. — Stockholders who vote to place the same in liquidation, and vote for the liquidators elected at that meeting, held not estopped from intervening in a proceeding to vacate an order of court replacing the liquidators by a receiver, who opposed the vacating of the order.—*In re* Eckhardt Mfg. Co., La., 38 So. Rep. 78.

44. CORPORATIONS—Sale of Assets.—That the president of a corporation applied the proceeds of an unauthorized sale of corporate machinery to corporate indebtedness without the knowledge of the directors held not a corporate ratification of the sale.—Giebler Mfg. Co. v. Kranenberg, 92 N. Y. Supp. 843.

45. CORPORATIONS—Unpaid Subscriptions.—A subscription to stock, payable in specifics worth not more than 10 per cent. of the face of the shares, held a fraud on the subsequent creditors of the corporation.—Allen v. Grant, Ga., 50 S. E. Rep. 494.

46. CORPORATIONS — Unpaid Stock Subscriptions. — Stockholders against whom a corporation creditor seeks to enforce an unpaid stock subscription, under Rev. St 1895, art. 671, held entitled to a jury trial.—McFarland v. Martin & Moodie, Tex., 86 S. W. Rep. 689.

47. COURTS—Summary Judgment in City Court.—A summary judgment in favor of the plaintiff in an action in the Baltimore city court held properly stricken on the ground of surprise, etc.—Mueller v. Michaels, Md., 60 Atl. Rep. 485.

48. COVENANTS—Action for Breach.—Where plaintiff sued for an alleged breach of a written covenant to discharge a lien, allegations as to the circumstances under which he paid off the lien to perfect a sale of the land were relevant.—Lampkin v. Garwood, Ga., 50 S. E. Rep. 171.

49. CRIMINAL EVIDENCE—Testimony Given at Former Trial.—Where evidence introduced against defendant on a former trial was admitted without an objection under an agreement between his counsel and the prosecuting attorney, he waived his constitutional right (Const., art. 2, § 22) to "meet the witnesses against him face to face."—State v. Williford, Mo., 86 S. W. Rep. 570.

50. CRIMINAL LAW — Irregularity in Organization of Grand Jury.—Where the irregularity relied on as a matter of abatement relates to the organization of the grand jury, the plea must show in what the irregularity consists.—State v. Taylor, W. Va., 50 S. E. Rep. 247.

51. CRIMINAL TRIAL — Improper Argument. — Transgression of the bounds of legitimate argument by the district attorney held not ground for reversal, where it was promptly corrected by the court.—State v. Dunn, Wis., 102 N. W. Rep. 935.

52. CRIMINAL TRIAL — Jurisdiction of Justice of the Peace.—Where a justice of the peace acts without jurisdiction in the trial of a criminal case, a municipal court can obtain no jurisdiction of the cause on appeal from the justice court.—Stoltman v. Town of Lake, Wis., 102 N. W. Rep. 920.

53. CRIMINAL TRIAL—Larceny.—Where defendant was indicted for larceny from the house, and was found guilty of simple larceny, an assignment as to rulings on the larceny from the house will not be considered.—Patterson v. State, Ga., 50 S. E. Rep. 489.

54. CRIMINAL TRIAL—Plea of Not Guilty.—A plea of not guilty, entered on an indictment for murder, is not inconsistent with the statement that defendant on arraignment confessed the crime, under P. L. 1898, p. 824, § 107.—State v. Valentina, N. J., 60 Atl. Rep. 177.

55. DEATH—Evidence of Earning Capacity.—What deceased spent on his family held evidence of his earning capacity, in the absence of better evidence —Memphis Consol. Gas & Electric Co. v. Letson, U. S. C. C. of App., Sixth Circuit, 135 Fed. Rep. 969.

56. DEATH—Sufficiency of Petition.—A petition in an action by a widow to recover against a railroad company for the death of her husband held sufficient to show that the acts complained of were those of the agents of the defendant.—Pierce v. Seaboard Air Line Ry., Ga., 50 S. E. Rep. 468.

57. DIVORCE—Alimony.—Where wife obtains decree of absolute divorce with alimony, questions as to alimony cannot be readjudicated.—Goodsell v. Goodsell, 92 N. Y. Supp. 1038.

58. DOWER—Lands Held in Trust.—Legatee, who, in compromise of a will contest, agreed to convey certain of testator's lands to heirs held to hold the land agreed to be conveyed as trustee for the heirs, and his widow was not entitled to dower therein.—Allard v. Allard, Ky., 86 S. W. Rep. 679.

59. ELECTRICITY—Right to Infer Negligence.—An inference of negligence held inferable by the jury from the killing of a customer of an electric light company by the crossing of the primary and secondary wires.—Memphis Consol. Gas & Electric Co. v. Letson, U. S. C. C. of App., Sixth Circuit, 135 Fed. Rep. 969.

60. EMBEZZLEMENT—Evidence.—In a prosecution of a deputy township treasurer for embezzlement, it was proper to show that defendant, by reason of his default as village treasurer, found it necessary to replenish that account, which he did with funds drawn from the township treasury.—People v. Sanders, Mich., 102 N. W. Rep. 959.

61. EMINENT DOMAIN—Action for Damages for Burning Grass.—In an action for burning grass, opinion of the person tending the fire as to the danger to be anticipated held inadmissible in evidence.—Dunn v. Newberry, Tex., 86 S. W. Rep. 626.

62. EQUITY—Coming Into Court with Clean Hands.—The maxim of equity that a complainant must come into court with clean hands has reference to fraud or misconduct on the part of complainant in regard to the transaction which is the subject of controversy.—Knapp v. S. Jarvis Adams Co., U. S. C. C. of App., Sixth Circuit, 135 Fed. Rep. 1008.

63. EQUITY—Sworn Answers.—A sworn answer denying the allegations in the bill is conclusive evidence for defendant, unless overcome by the testimony of two witnesses; or one witness corroborated by other circumstances. — Ocala Foundry & Machine Works v. Lester, Fla., 38 So. Rep. 56.

64. EVIDENCE—Assumed Risk.—In an action for death of a block foreman in a quarry, evidence as to his duty with respect to dangerous apparatus outside his immediate surroundings in the quarry held improperly excluded.—Lounsbury v. David, Wis., 102 N. W. Rep. 941.

65. EVIDENCE—Existence of a Quarantine.—Where the question is as to the existence of a quarantine, the witness could state that fact, without introducing the ordinance authorizing it.—Mitchiner v. Western Union Tel. Co., S. Car., 50 S. E. Rep. 190.

66. EVIDENCE—Grant from State.—Where, in the light of facts which a court will recognize judicially, a lot of land described in a grant from the state can be located, the grant should be admitted in evidence.—Stanford v. Bailey, Ga., 50 S. E. Rep. 161.

67. EVIDENCE—Newspaper Report as to Market Price of Stock.—A newspaper report of the market price of corporate stock is not admissible to prove the price of the stock, unless it is shown how the report is made up. —Bunte v. Schumann, 92 N. Y. Supp. 806.

68. EVIDENCE—Production of Books.—In an action to restrain a town from paying certain railroad aid, an order requiring it to produce its books was properly granted, though the rule was less than 10 days, where defendant made no showing that it was impossible to produce.—Town of Adel v. Woodall, Ga., 50 S. E. Rep. 491,

69. EVIDENCE—Stenographer's Minutes.—Stenographer's minutes of a witness' examination on a former trial held not primary evidence thereof, so as to render statement by a person present at such examination objectionable as secondary.—Weinhandler v. Eastern Brewing Co., 92 N. Y. Supp. 792.

70. EVIDENCE—Validity of Service Under Foreign Statute.—Where, in an action on foreign judgments, the sufficiency of the service under a foreign statute is collaterally questioned, such statute is admissible in evidence.—Johnston v. Mutual Reserve Life Ins. Co., 92 N. Y. Supp. 1052.

71. EVIDENCE—Will Contest.—Statements by a minor, who was testator's principal legatee, with reference to the latter's incompetency, held not an admission that testator was insane.—Gesell v. Baugher, Md., 60 Atl. Rep. 481.

72. EXECUTORS AND ADMINISTRATORS — Attorney's Fees.—Award of orphans' court to an attorney of one-half the fund realized by sale of real estate of decedent under contract with administrator affirmed. — *In re* Shoenberger's Estate, Pa., 60 Atl. Rep. 502.

73. FIRE INSURANCE—Loss by Theft During Fire.—A clause in a policy of fire insurance exempting the company from liability for loss caused by theft means the theft during the fire.—Schlencher v. Fire Assn. of Philadelphia, N. J., 60 Atl. Rep. 282.

74. FIRE INSURANCE—Warranties.—Where a promise in a policy of insurance is declared to be a warranty, the only concern of the courts is to ascertain whether it has been complied with.—St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co., La., 38 So. Rep. 87

75. FRAUDS, STATUTE OF—Forcible Entry and Detainer In forcible entry and detainer, a contract by defendant with the husband of the owner of the building for its lease for 10 years is inadmissible, under the statute of frauds, when not signed by the owner of the building.—Graham v. Hiesel, Neb., 102 N. W. Rep. 1010.

76. FRAUDULENT CONVEYANCES—Equitable Interests In determining the equitable interest in land of a party who had paid the purchase price, the value of the land at the time of its resale, and not at the time of the original purchase, should be considered.—McNair v. Moore S. Car., 50 S. E. Rep. 197.

77. GUARANTY — Construction. — A guaranty of "the payment of all bills payable by this contract" includes a balance of the total amount remaining unpaid.—Klosterman v. United States Electric Light & Power Co., Md., 60 Atl. Rep. 251.

78. HOMICIDE—Burden of Proving Beyond a Reasonable Doubt.—Where the homicide is denied by defendant, the burden is on the prosecution to prove the killing beyond a reasonable doubt, and, to justify a verdict of murder in the first degree, to prove premeditation and deliberation.—State v. Teachey, N. Car., 50 S. E. Rep. 232.

79. HUSBAND AND WIFE—Action to Set Aside Deed to Wife.—Husband, who, actuated by a baseless fear of impending litigation, conveyed property to his wife, held not entitled to have the conveyance set aside.—Newman v. Newman, Tex., 86 S. W. Rep. 635.

80. INJUNCTION — Ejectment. — A corporation having ratified a lease of its property made by one of its officers, the lessees held entitled to enjoin the corporation from maintaining ejectment to recover the property.—Clement v. Young-McShea Amusement Co., N. J., 60 Atl. Rep. 419.

81. INTOXICATING LIQUORS—Keeping Liquor with Intent to Sell.—It cannot be said as a matter of law that the keeping of more than one quart of liquor in one's possession has no relation to an intent to sell.—State v. Barrett, N. Car., 50 S. E. Rep. 506.

82. JUDGMENT—Action Against Several Defendants.—In an action against several defendants for damages for burning grass, plaintiff was entitled to recover against all the defendants, or any one whose liability he established.—Dunn v. Newberry, Tex., 86 S. W. Rep. 626.

83. JUDGMENT—Jurisdiction to Enter Judgment.—The court does not lose jurisdiction of a motion for final judgment because the argument was brought on during the first judicial term of the judge and a reargument was heard after the commencement of his second term.—Jewett v. Schmidt, 92 N. Y. Supp. 737.

84. JUDGMENT—Motion to Strike Out.—On a motion to strike out a judgment for irregularity in the proceeding, the question of jurisdiction, and whether the proper steps were taken to justify entry of the judgment is open for review.—Mueller v. Michaels, Md., 60 Atl. Rep. 485.

85. JUDGMENT—Setting Aside.—Where a motion in arrest is granted for any reason, and the judgment is set aside, the motion is still pending with a right to amend. Union Compress Co. v. A. Leffler & Son, Ga., 50 S. E. Rep. 483.

86. JUDGMENT—Validity of Foreign Judgment.—It was not essential to the validity of foreign judgments against a nonresident life insurance company that the statutes prescribing the mode of service should be incorporated or referred to in the judgment roll —Johnston v. Mutual Reserve Life Ins. Co., 92 N. Y. Supp. 1052.

87. JUDGMENT—Validity where Service was Void on One Defendant.—A judgment against several, void as to one for lack of proper service, is void as to all.—Comenitz v. Bank of Commerce, Miss., 38 So. Rep. 35.

88. JUDICIAL SALES—Notice as to Retention of Surplus.—At judicial sales no law requires the sheriff to announce that the purchaser can retain any surplus over the claim of the seizing creditor to satisfy any special mortgages subordinate to the claim of the seizing creditor.—McLellan v. Rosser, La., 38 So. Rep. 85.

89. LANDLORD AND TENANT—Liability for Property Wrongfully Withheld.—Where, on a lease of a theater by plaintiff, he placed certain furniture in the building, and on termination of the lease the lessor improperly refused to allow him to remove them, and they were destroyed by fire, the lessor was liable for the value thereof.—Morris v. Pratt, La., 38 So. Rep. 70.

90. LANDLORD AND TENANT—Overflowing Faucet.—The happening of an overflow from a faucet, to which the employees of both defendant and another had access, held insufficient to establish a *prima facie* liability against defendant.—Aschenbach v. Keene, 92 N. Y. Supp. 764.

91. LIBEL AND SLANDER—Actionable Words — Language used toward another is actionable, if in the circumstances under which it was used the hearer would reasonably understand that it was intended to impute a crime.—Line v. Spies, Mich., 102 N. W. Rep. 993.

92. LICENSES—Intoxicating Liquors.—An order of the county court granting a renewal of a dramshop license need not recite the making of the original order or the granting of a previous license.—State v. Mulloy, Mo., 86 S. W. Rep. 569.

93. LIENS—Foreclosure of Mortgage. — Any creditor who takes a whole fund on which two or more creditors have concurrent liens must account therefor to his fellow lien claimants.—Stiles & McClay v. Galbreath, N. J., 60 Atl. Rep. 224.

94. LIFE INSURANCE—Untrue Answers in Application.—An untrue answer in an application for life insurance as to material matters within the knowledge of the applicant will avoid the policy.—Royal Neighbors of America v. Wallace, Neb., 102 N. W. Rep. 1020.

95. MANDAMUS—Director of Public Works.—*Mandamus* will not lie to compel approval of contract by director of public works, such approval being discretionary.—Commonwealth v. City of Philadelphia, Pa., 60 Atl. Rep 549.

96. MANDAMUS—Justice of the Peace.—A justice of the peace acts ministerially only in presiding in an eminent domain proceeding, and his actions therein may be controlled by *mandamus*.—Sullivan v. Yazoo & M. V. R. Co. Miss., 38 So. Rep. 33.

97. MARRIAGE—Action for Annulment —The jurisdiction of the court of chancery to annul a marriage for duress is not derived from the divorce statute, but is inherent in such court.—Avakian v Avakian, N. J., 60 Atl Rep. 521.

98. MASTER AND SERVANT—Failure to Instruct.—Failure of a master to inform a servant that the machinery operated by him could not be stopped by the usual means under certain circumstances held actionable negligence.—Yess v. Chicago Brass Co., Wis., 102 N. W. Rep. 982.

99. MASTER AND SERVANT—Injury from Overcharged Electric Machine.—Master held liable for injuries to servant from overcharging of electrical machine, irrespective of what did in fact cause the overcharge.—Kremer v New York Edison Co., 92 N. Y. Supp. 883.

100 MASTER AND SERVANT — Negligence of Another Employee.—Where a servant was injured by failure of another employee to use an appliance properly, he did not assume the risk thereof.—Levens v. Bancroft, Ross & Sinclair, La., 38 So. Rep. 72.

101. MASTER AND SERVANT—Safe Place to Work —A master must furnish an employee a safe place in which to work and provide him with suitable appliances.—Sweigert v. Klingensmith, Pa., 60 Atl. Rep. 258.

102. MASTER AND SERVANT—Servants of Independent Contractor.—The owner of a mill held not liable for injuries to an employee caused by the negligence of a servant of an independent contractor for failure to provide plaintiff with a safe place to work.—Smith v. Naushon Co., R. I., 60 Atl. Rep. 242.

103. MASTER AND SERVANT—Waiver of Breach of Employment Contract. — Where a master has waived a breach of the contract, consisting of the servant's absence from work, the breach is not thereafter available as a ground for discharge.—Spindel v. Cooper, 92 N. Y. Supp. 822.

104. MASTER AND SERVANT—Wrongful Discharge of Servant.—A traveling salesman, who was wrongfully discharged before the termination of his employment, held not entitled to recover hotel bills and traveling expenses paid by him after his discharge.—Cross v. Florsheim, 92 N. Y. Supp. 832.

105. MECHANICS' LIENS — Provisions in Contract —A provision against liens in an unfiled building contract does not protect the building from liens other than those of the party to such contract.—Stewart Contracting Co. v. Trenton & N. B. R. Co., N. J., 60 Atl. Rep. 405.

106. MORTGAGES—Equitable Liens.—The equitable lien acquired by the mortgagee in a mortgage executed before the mortgagor obtained title to the premises, held inferior to the rights of a subsequent *bona fide* purchaser for value.—Donovan v. Twist, 92 N. Y. Supp. 990.

107. MORTGAGES—Fraudulent Alteration. — Manifest alteration in deed held to put subsequent mortgagee on notice that grantee was only a trustee of the real owner of the property.—Flitcraft v. Commonwealth Title Ins. & Trust Co., Pa., 60 Atl. Rep. 557.

108. MORTGAGES—Security Deed.—Where one borrows money, and executes a judgment on default before the execution is levied, the lender must reconvey and have

the deed recorded.—Benedict v. Gammon Theological Seminary, Ga., 50 S. E. Rep. 162.

109. MUNICIPAL CORPORATIONS—Defective Streets.—A fall into an open inlet in a public street in the dark is not conclusive of contributory negligence.—Dougherty v. City of Philadelphia, Pa., 60 Atl. Rep. 261.

110. MUNICIPAL CORPORATIONS — Incorporation. — Where a town was reincorporated as a city by an act repealing all conflicting laws, the territory thereafter became a city, though the act granting a charter to the town had not been expressly repealed.—Wright v. Overstreet, Ga , 50 S. E. Rep. 487.

111. MUNICIPAL CORPORATIONS—Taxation. — Property annexed to a city after the time the assessor was required to return his list held not taxable for the local taxes of the city for that year. — City of Latonia v. Meyer, Ky., 86 S. W. Rep. 686.

112. MUNICIPAL CORPORATIONS—Use of Money Paid for Taxes.- Where money collected from taxes is paid into the city treasury without appropriation for any particular purpose, it may be used for any legitimate expenditure —Blood v. Beale, Me., 60 Atl. Rep. 427.

113. NAVIGABLE WATERS—Riparian Rights to Accretions —Where a riparian owner had by accretion acquired a vested contingent interest in accretions by change of water line on a meandered lake, he could not be deprived thereof by a later patent of such vested interests.—Weber v. Axtell, Minn., 102 N. W. Rep. 915.

114. NEGLIGENCE—Attempt to Save Life.—One is justified in attempting to save human life, and in so doing is bound only to use due care, in view of the circumstances and emergency of the occasion.—Ridley v. Mobile & O R. Co., Tenn , 86 S. W. Rep. 606.

115 NEGLIGENCE—Injury While Attempting to Board. —One held not guilty of contributory negligence as matter of law in attempting to board a street car when its speed is no greater than that of a man going at a fast walk.—Spencer v. St. Louis Transit Co., Mo., 86 S. W. Rep. 593.

116. PARENT AND CHILD—Right to Custody of Infant — Parents have no right to the custody of their infant children, except subject to the paramount right of the state, to be exercised whenever deemed for the best interest of the children.—Wadleigh v. Newhall, U. S. C. C., N. D. Cal , 135 Fed. Rep. 941.

117. PARTNERSHIP—Advances by One Partner for Another.—A release executed by one partner, discharging the copartner from liability for a sum advanced, held to operate as a discharge, though the amount of the advance was entered on the firm books as standing against the partner for whom the advance was made.—Sterling v. Chapin, 92 N. Y. Supp. 904.

118. PARTNERSHIP—Claim Against Deceased Partner.—The accounts of a partnership must first be settled in court of common pleas, before the claim of one partner against the estate of the deceased partner can be passed upon in the orphan's court.—*In re* De Coursey's Estate, Pa., 60 Atl. Rep. 490.

119. PARTNERSHIP—Evidence as to Existence of Relation.—On an issue as to whether defendant was a member of certain firm evidence as to what one of the members of the firm said as to who constituted the firm was incompetent.—Rector v. Robins, Ark., 86 S. W. Rep. 667.

120. PARTNERSHIP—What Constitutes —Where a partner contracts with a third person for a division of the profits in the partnership enterprise, such person does not become a member of the partnership, nor liable for its debts.—Morrison v Dickey, Ga., 50 S. E. Rep. 175.

121. PRINCIPAL AND AGENT—Acts of Agent. — Where the obligee in a note and mortgage obtained by an agent claims the benefits thereof, he is also bound by the acts of the agent in the transaction by which they were procured.—Corbett v. Clute, N. Car., 50 S. E. Rep. 216.

122. PRINCIPAL AND AGENT—Notice to Agent of Inferiority of Goods Delivered.—A notice of the inferiority of goods sued for, given to plaintiff's agent at a time when defendants knew that the agent would not communicate it to plaintiff, held not notice to plaintiff.—Brown v. Harris, Mich., 102 N. W. Rep. 960.

123. PRINCIPAL AND AGENT—Ratification of Lease by Acceptance of Rent.—Where a lease was signed by an agent in his principal's name, the latter, by subsequently accepting rent with knowledge of the lease, ratified such signature.—Clement v. Young-McShea Amusement Co., N. J., 60 Atl. Rep. 419.

124. PRINCIPAL AND SURETY — Death of Principal Debtor.—The surety on a note may be sued thereon after the maker's death, without necessity of first presenting the claim to the deceased's administrator.—Planters' & Mechanics' Nat. Bank v. Robertson, Tex., 86 S. W. Rep. 643.

125. PRINCIPAL AND SURETY—Liability Under Contractor's Bond.—The sureties on a contractor's bond to indemnify owner for a breach of contract held responsible for such damages as resulted in the performance of the contract to an adjoining building.—Leppert v. Flaggs, Md., 60 Atl. Rep. 450.

126. QUIETING TITLE — Community Property. — The husband's title to community property will not be quieted against the unfounded verbal assertion of the wife to title.—Newman v. Newman, Tex., 86 S. W. Rep. 635.

127. QUIETING TITLE — Possession. — Except in the case of wild lands, it must appear, in an action to remove a cloud on title, that petitioner was in possession. —Weyman v. City of Atlanta, Ga., 50 S. E. Rep. 492.

128. RAILROADS - Injury Due to Obstructed View at Crossing.—A person injured while crossing a railroad track held not guilty of contributory negligence as a matter of law in failing to inquire whether it was safe to cross.—Coffee v. Pere Marquette R. Co., Mich., 102 N. W. Rep. 953.

129. RECEIVERS—Personal Expenses and Attorney's Fees.—Where a receiver's account claimed allowances for personal expenses and attorney's fees not supported by voucher or proof of payment, it could not be allowed.—Strauss v. Casey Machine & Supply Co., N. J., 60 Atl. Rep. 402.

130. RECEIVERS — Suit Without Leave. — The commencement of an action against a receiver without leave does not affect the jurisdiction of the court, but merely constitutes contempt, and the action is regular until the proceeding is stayed or set aside by the court. —Pruyn v. Black, 92 N. Y. Supp. 995.

131. REPLEVIN—Damages —In replevin, the fair, reasonable, ordinary use value of the property, estimated by the market value of such use, held the proper measure of damages.—Ocala Foundry & Machine Works v. Lester, Fla., 38 So. Rep. 51.

132. SALES—Acceptance.—Where defendants accepted goods sued for, they were liable for the contract price, and not the actual value of the goods delivered.—Brown v. Harris, Mich., 102 N. W. Rep. 960.

133. SALES—Acceptance.—A delay in returning goods sold by sample from November 20th until December 12th held to amount to an acceptance of the goods.—MacEvoy v. Aronson, 92 N. Y. Supp. 724.

134. SALES—Burden of Proving Goods Tendered Complied With Contract.—In an action to enforce a contract for the sale of goods, plaintiff has the burden of showing that the goods tendered complied with the contract.—McCall Co. v. Jacobson, Mich., 102 N. W. Rep. 1011.

135. SALES—Condition of Goods at Place of Delivery.—Contract for delivery of goods in a certain condition at the buyer's place of business is broken or not according to the condition of the goods at that place.—Union Carpet Lining Co. v. George F. Miller & Co., Tex., 86 S. W. Rep. 651.

136. SALES—Duty to Inspect.—If original contract for sale of goods does not require consignee to inspect, he is not required so to do because bill of lading so provides.—Marlboro Wholesale Grocery Co. v. Brooke, S. Car., 50 S. E. Rep. 186.

137. SHIPPING—Interrogatories in Pleading.—Interrogatories annexed to an answer in a proceeding for limitation of liability, which are directed solely to the discovery of assets of the petitioner, are immaterial to the issues and subject to exception.—*In re* Knickerbocker Steamboat Co., U. S. D. C., S. D. N. Y., 135 Fed. Rep. 956.

138. SPECIFIC PERFORMANCE — Unconscionable Contracts.—Any fact showing that a contract is unfair, unjust, and against good conscience will justify a court of equity in refusing to decree its performance.—Berry v. Frisbie, Ky., 86 S. W. Rep. 558.

139. STATUTES — Intoxicating Liquors. — The legislature has power to pass statutes of local application governing the liquor traffic, and to declare a misdemeanor the keeping of spirituous liquors with intent to sell in a certain county of the state.—State v. Barrett, N. J., 60 Atl. Rep. 506.

140. STREET RAILROADS—Collision with Wagon.—On approaching a public street junction, the motorman must anticipate that any person approaching such crossing from either side may turn his team into the street.—Marden v. Portsmouth, K. & Y. St. Ry., Me., 60 Atl. Rep. 530.

141. STREET RAILROADS—Collision with Wagon.—That a car runs quite a distance after an accident is not conclusive of negligence, where the evidence shows that it was disabled in the collision and became uncontrollable.—Riley v. Shreveport Traction Co., La., 38 So. Rep. 83.

142. STREET RAILROADS — Death to Passenger.—The fact that a passenger on a street car was injured does not of itself raise a presumption of negligence on the part of the carrier.—State v. United Rys. & Electric Co., Md., 60 Atl. Rep. 249.

143. STREET RAILROADS—Injury to Pedestrian Crossing Between Motionless Cars.—It is not contributory negligence as a matter of law for a person to cross a street railway track between two motionless cars.—Fitzgerald v. New York City Ry. Co., 92 N. Y. Supp. 722.

144. STREET RAILROADS—Refusal to Accept Transfer.—Where a street railway company was legally bound to issue transfers, and one was actually issued to plaintiff, defendant could not justify ejecting plaintiff on the ground that it did not issue transfers at such point.—Chiert v. Interurban St. Ry. Co., 92 N. Y. Supp. 781.

145. SUBROGATION—Estate of Deceased Partner.—The estate of a deceased partner held entitled, on payment of attorney's fees incurred by the surviving partner on the firm's account, to subrogation to the attorney's lien for the fees.—Jones v. Dulaney & Mitchell, Ky., 86 S. W. Rep. 547.

146. SUBROGATION—Volunteer. — One tendering to a mortgagee, at the request and for the benefit of a tenant in common of the mortgaged premises, the full amount of the debt, held not a mere volunteer, to whom subrogation should be denied.—Simonson v. Lauck, 92 N. Y. Supp. 965.

147. TAXATION—Delegation of Power.—The legislature, in which the power of taxation resides, cannot delegate to another body having no governmental function the authority to determine in its discretion the amount to be raised by taxation —Van Cleve v. Passaic Valley Sewerage Com'rs, N. J., 60 Atl. Rep. 214.

148. TAXATION—Validity of Assessment Notice.—Where a widow uses the initials of her deceased husband, an assessment in which she is so described is sufficient.—Tieman v. Johnston, La., 38 So. Rep. 75.

149. TAXATION—Void Tax Deed. — Where, in a suit by the holder of a void tax deed to quiet title, judgment was rendered for a sale of a building which had been removed by the owner, an order confirming the sale of the building held erroneous, in so far as it characterized the building as an "article of personal property."—Easton v. Cranmer, S. Dak., 102 N. W. Rep. 944.

150. TENDER—Uncertified Check.—A tender of an uncertified check is sufficient, if it is not objected to on the ground that it is uncertified.—Bunte v. Schumann, 92 N. Y. Supp. 806.

151. TRADE MARKS AND TRADE NAMES—Use of Corporate Name.—That a person has acquired some skill in a business which he has conducted with the intent of profiting unlawfully by the trade reputation of another does not, as against an injured party, entitle a corporation in which he is interested to adopt that name in the same business —International Silver Co. v. Wm. H. Rogers Corp., N. J., 60 Atl. Rep. 187.

152. TRUSTS — Charges Against for Procuring Letters with Will Annexed.—A trust fund is not chargeable with expenses of counsel in procuring letters with the will annexed.—Jewett v. Schmidt, 92 N. Y. Supp. 737.

153. TRUSTS—Grounds for Removing Co-trustee.—The existence of inharmonious relations between testator's wife, acting as co-trustee, and the beneficiary of the trust, and the wife's conduct in renouncing the will, held to warrant her removal as trustee.—Polk v. Linthicum, Md., 60 Atl. Rep. 455.

154. TRUSTS—Validity of Provision in Will.—A clause of a will enlarging a trust created for testatrix's husband, so as so invalidate it, held not a separable provision, which could be rejected and the trust sustained.—Ullman v. Cameron, 92 N. Y. Supp. 976.

155. VENDOR AND PURCHASER—Certificates of Goods Furnished.—Estimates and certificates of vendee's engineer as to coal delivered held conclusive on the parties under their contract, in the absence of fraud or mistake.—Price v. City of New York, 82 N. Y. Supp. 967.

156. WATERS AND WATER COURSES—Railway Embankment Causing Inundation of Land.—Measure of damages for the construction of a permanent railway embankment, subjecting land to inundation, held the difference in the value of the land before and after the construction.—Texas Cent. R. Co. v. Brown, Tex., 86 S. W. Rep. 659.

157. WILLS—Conditional Devise.—Where a devise was to the survivor of testatrix's two daughters remaining unmarried, it did not pass by the will of the unmarried daughter, who died prior to the death of her married sister.—Hill v. Safe Deposit & Trust Co., Md., 60 Atl. Rep. 446.

158. WILLS—Contest.—Where testator had mental capacity and was free from undue influence, it was immaterial that he made an unequal division of his property.—Gesell v. Baugher, Md., 60 Atl. Rep. 481.

159. WILLS—Mental Capacity.—Where it was contended that testator was a victim of the morphine habit, evidence of the symptoms disclosed by her was admissible to enable experts to testify to the main fact.—Buxton v. Emery, Mich., 102 N. W. Rep. 948.

160. WILLS—Resulting Trusts.—A sealed letter, referred to by testator in his will, but not executed as a will nor attached to the will, being testamentary in character, held ineffective as a part of the will.—Bryan v. Bigelow, Conn., 60 Atl. Rep. 266.

161. WITNESSES—Act of God.—A newspaper account of an interview had between the publisher of a paper and a witness, with reference to a cloud-burst which was the subject of the witness' evidence, held inadmissible to affect his credibility or otherwise.—Southern Pac. Co. v. Schuyler, U. S. C. C. of App., Ninth Circuit, 135 Fed. Rep. 1015.

162. WITNESSES—Cross-Examination.—In an action for the price of goods sold, the sustaining of an objection to further cross examination of plaintiff held not error.—Brown v. Harris, Mich., 102 N. W. Rep. 960.

163. WITNESSES—Examination by Judge.—Where, on an examination of a witness by the court, it does not express any opinion, the fact that such evidence may be detrimental to a party is not ground for new trial—Johnson v. A. Leffler Co., Ga., 50 S. E. Rep. 488.

164. WITNESSES—Explanation of Previous Statements.—It is not error to permit a witness for the state to explain a statement made by him which has been brought into the case by the accused.—State v. Taylor, W. Va., 50 S. E. Rep. 247.